Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 17 JUNE 1, 1983 No. 22

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 83-106)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
April 1, 1983	$0.000016
Chile peso:	
April 1, 1983	.013387
Colombia peso:	
April 1, 1983	.013596
Greece drachma:	
April 1, 1983	.011898
Indonesia rupiah:	
April 1, 1983	.001029
Israel shekel:	
April 1, 1983	.025145
Peru sol:	
April 1, 1983	.000838
South Korea won:	
April 1, 1983	.001310

(LIQ-03-01 S:C:I)

Dated: April 1, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-107)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
April 4-8, 1983	$0.000015
Chile peso:	
April 4-7, 1983	.012500
April 8, 1983	.013333
Colombia peso:	
April 4, 1983	.013578
April 5-7, 1983	.013470
April 8, 1983	.013421
Greece drachma:	
April 4, 1983	.011898
April 5, 1983	.011919
April 6, 1983	.011933
April 7, 1983	.011905
April 8, 1983	.011879
Indonesia rupiah:	
April 4-8, 1983	.001029
Israel shekel:	
April 4, 1983	.025145
April 5-8, 1983	.024900
Peru sol:	
April 4, 1983	.000805
April 5-7, 1983	.000796
April 8, 1983	.000789
South Korea won:	
April 4-8, 1983	.001310

(LIQ-03-01 S:C:I)

Dated: April 8, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-108)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
April 11-15, 1983	$0.000015
Chile peso:	
April 11-14, 1983	.013333
April 15, 1983	.013351
Colombia peso:	
April 11-14, 1983	.013421
April 15, 1983	.013360
Greece drachma:	
April 15, 1983	.011905
April 16, 1983	.011919
April 17, 1983	.011912
April 18, 1983	.011919
April 19, 1983	.011905
Indonesia rupiah:	
April 11-14, 1983	.001029
April 15, 1983	.001030
Israel shekel:	
April 11, 1983	.024667
April 12-13, 1983	.024504
April 14-15, 1983	.024450
Peru sol:	
April 11-14, 1983	.000789
April 15, 1983	.000772
South Korea won:	
April 11-14, 1983	.001307
April 15, 1983	.001306

(LIQ-03-01 S:C:I)

Dated: April 15, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-109)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
April 18–22, 1983	$0.000015
Chile peso:	
April 18–21, 1983	.013351
April 22, 1983	.013245
Colombia peso:	
April 18–21, 1983	.013360
April 22, 1983	.013245
Greece drachma:	
April 18, 1983	.011898
April 19, 1983	.011905
April 20, 1983	.011898
April 21, 1983	.011884
April 22, 1983	.011919
Indonesia rupiah:	
April 18–21, 1983	.001030
April 22, 1983	.001031
Israel shekel:	
April 18, 1983	.024361
April 19–20, 1983	.024254
April 21, 1983	.024114
April 22, 1983	.024079
Peru sol:	
April 18–21, 1983	.000773
April 22, 1983	.000756
South Korea won:	
April 18, 1983	.001306
April 19–22, 1983	.001305

(LIQ-03-01 S:C:I)

Dated: April 22, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-110)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
April 25-29, 1983	$0.000015
Chile peso:	
April 25-28, 1983	.013245
April 29, 1983	.013333
Colombia peso:	
April 25-29, 1983	.013245
Greece drachma:	
April 25, 1983	.011876
April 26, 1983	.011869
April 27-28, 1983	.011876
April 29, 1983	.011898
Indonesia rupiah:	
April 25-29, 1983	.001031
Israel shekel:	
April 25, 1983	.024050
April 26, 1983	.023964
April 27, 1983	.023883
April 28, 1983	.023798
April 29, 1983	.023742
Peru sol:	
April 25-28, 1983	.000756
April 29, 1983	.000742
South Korea won:	
April 25-27, 1983	.001305
April 28-29, 1983	.001304

(LIQ-03-01 S:C:I)

Dated: April 29, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-111)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83-90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Venezuela bolivar:	
April 8, 1983	$0.116959

(LIQ-03-01 S:C:I)

Dated: April 8, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-112)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83-90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Venezuela bolivar:	
April 11-12, 1983	$0.116959
April 13-15, 1983	.106383

(LIQ-03-01 S:C:I)

Dated: April 15, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-113)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83-90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
April 20-22, 1983	$0.002259
United Kingdom pound:	
April 18, 1983	1.5610
Venezuela bolivar:	
April 18-21, 1983	.106383
April 22, 1983	.105263

(LIQ-03-01 S:C:I)

Dated: April 22, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83-114)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 83-90 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

405-947 O - 83 - 2

Brazil cruzeiro:	
April 25–27, 1983	$0.002259
April 28–29, 1983	.002198
United Kingdom pound:	
April 25, 1983	1.5680
April 26, 1983	1.5700
April 27, 1983	1.5680
April 28, 1983	1.5592
April 29, 1983	1.5573
Venezuela bolivar:	
April 25–28, 1983	.105263
April 29, 1983	.099010

(LIQ-03-01 S:C:I)

Dated: April 29, 1983.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 83–115)

Bonds

Approval and discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: May 13, 1983.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
A. C. Express, Inc., 9350 Harrison Rd., Romulus, MI; motor carrier; Transamerica Ins. Co. of MI	Apr. 7, 1983	Apr. 14, 1983	Detroit, MI $50,000
Affiliated Transport Service Inc., 530 Duncan Ave., Jersey City, NJ; motor carrier; The North River Ins. Co. (PB 2/9/78) D 4/6/83 [1]	Feb. 3, 1983	Apr. 6, 1983	Newark, NJ $50,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Baltimore Warehousing & Transportation, Inc., 2701 Boston St., Baltimore, MD; motor carrier; Ins. Co. of North America	Feb. 8, 1983	Apr. 22, 1983	Baltimore, MD $25,000
Beaver Transport Co., div. of Quality Carriers, Inc., 100 Waukegan Rd., Lake Bluff, IL; motor carrier; Washington International Ins. Co.	Apr. 21, 1983	Apr. 22, 1983	Chicago, IL $25,000
Calway Systems Inc., 8 Cedar Ave., Thornhill, Ontario, Canada; motor carrier; Aetna Casualty & Surety Co.	Feb. 9, 1983	Apr. 22, 1983	Buffalo, NY $40,000
Carolina & Northwestern Railway Co., P.O. Box 1808, Washington, D.C., rail carrier; Fidelity & Deposit Co. of MD (PB 1/29/62) D 4/19/83 [2]	June 1, 1982	Apr. 19, 1983	Norfolk, VA $50,000
Francisco A. Delgado, Inc., Box 7466, Ponce, PR; motor carrier; Ins. Co. of North America (PB 8/4/81) D 4/29/83 [3]	Aug. 23, 1982	Apr. 29, 1983	San Juan, PR $25,000
Delivery Exchange Service, Inc., 3141 N. Highway 67, Suite C, Mesquite, TX; motor carrier; Old Republic Ins. Co.	Apr. 14, 1983	Apr. 22, 1983	Dallas/Fort Worth, TX $25,000
First Flight Air Charter, Inc., P.O. Box 371, Romulus, MI; motor carrier; The Aetna Casualty & Surety Co. D 4/14/83	July 1, 1980	July 7, 1980	Detroit, MI $50,000
General Trucking Co., Inc., P.O. Box 269, 1107 Santa Fe Pike, Columbia, TN; motor carrier; U.S. Fidelity & Guaranty Co.	Apr. 18, 1983	Apr. 18, 1983	New Orleans, LA $25,000
Gulf Transport Ltd., 16 Exhibition Dr., P.O. Box 1507, Charlottetown, P.E.I., Canada; motor carrier; Old Republic Ins. Co. (PB 5/15/77) D 5/14/83 [4]	Apr. 27, 1983	May 15, 1983	Portland, ME $25,000
Howard G. Haughaboo, d.b.a.: John C. Haughaboo Trucking Co., 81 Deerfield Village, Maysville, KY; motor carrier; Hartford Accident & Indemnity Co. D 4/22/83	Apr. 19, 1982	May 4, 1982	Cleveland, OH $50,000
International Expediting, Inc., 3400 McIntosh Rd., Fort Lauderdale, FL; motor carrier; Old Republic Ins. Co. D 3/31/83	Oct. 15, 1982	Oct. 15, 1982	Miami, FL $25,000
Kat-B Transcon, Inc., 6938 Clinton Dr., Houston, TX; motor carrier; Washington International Ins. Co.	Apr. 21, 1983	Apr. 21, 1983	Houston, TX $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
L.R. Trucking, Inc., 968 Massachusetts Ave., Boston, MA; motor carrier; Peerless Ins. Co. (PB 3/13/81) D 4/21/83	Apr. 11, 1983	Apr. 21, 1983	Boston, MA $25,000
Matco, P.O. Box 2377, Abilene, TX; motor carrier; The Travelers Indemnity Co.	Apr. 7, 1983	Apr. 28, 1983	Houston, TX $50,000
North Central Jobbers, Inc., P.O. Box 279, Northwood, ND; motor carrier; Old Republic Ins. Co. D 4/6/83	Apr. 6, 1982	Apr. 6, 1982	Duluth, MN $25,000
North & South Lines, Inc., 2710 S. Main St., Harrisonburg, VA; motor carrier; The Travelers Indemnity Co.	Feb. 22, 1983	May 6, 1983	Baltimore, MD $50,000
O and A Transportation Inc., 3801 Trailmobile (P.O. Box 24176), Houston, TX; motor carrier; Washington International Ins. Co.	Apr. 20, 1983	Apr. 22, 1983	Houston, TX $50,000
PDPD Corp., trading as P & K Express, 98 Frelinghuysen Ave., Newark, NJ; motor carrier; Peerless Ins. Co.	May 3, 1983	May 5, 1983	Newark, NJ $50,000
Quality Carriers, Inc.—See Beaver Transport Co.			
Reliance Express, Inc., P.O. Box 70984, Charleston, SC; motor carrier; Reliance Ins. Co.	Jan. 3, 1983	May 2, 1983	Charleston, SC $25,000
Road-Rail Transportation Co., Inc. (a DE Corp.), 1111 Exterior St., Bronx, NY; motor carrier; The Aetna Casualty & Surety Co.	Mar. 28, 1983	Apr. 8, 1983	New York Seaport $150,000
SEA-MAR Services, Inc., 2111 N. Pace Blvd., P.O. Box 17829, Pensacola, FL; motor carrier; United States Fidelity & Guaranty Co. D 4/12/83	Feb. 28, 1981	Mar. 6, 1981	Mobile, AL $25,000
Schuster's Express, Inc., 48 Norwich Ave., Colchester, CT; motor carrier; Peerless Ins. Co. D 4/30/83	Apr. 30, 1976	May 28, 1976	Bridgeport, CT $25,000
Tax Airfreight, Inc., 4430 S. Kansas Ave., St. Francis, WI; motor carrier; Employers Ins. of Wausau	Apr. 1, 1983	May 16, 1983	Milwaukee, WI $25,000
Tennessee Cartage Co., P.O. Box 23193, Nashville, TN; motor carrier; The American Ins. Co.	May 5, 1983	May 6, 1983	New Orleans, LA $25,000
Thor Imports, Inc., 1000 Dragon St., Dallas, TX; motor carrier; St. Paul Fire & Marine Ins. Co. D 3/14/83	Apr. 24, 1969	May 2, 1969	Houston, TX $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Tonka Corp., 4144 Shoreline Blvd., Spring Park, MN; motor carrier; Great American Ins. Co.	Mar. 28, 1983	Apr. 18, 1983	El Paso, TX $50,000
Truck Air, Inc., 576 Lake Mirror Rd., College Park, GA; motor carrier; Ins. Co. of North America D 5/13/83	July 7, 1982	Aug. 5, 1982	Savannah, GA $25,000
U.S. Contract Trucking, Inc., 2730 Carl Rd., P.O. Box 2120, Irving, TX; motor carrier; The Travelers Indemnity Co.	Apr. 7, 1983	Apr. 14, 1983	Dallas/Fort Worth, TX $50,000

[1] Surety is Peerless Ins. Co.
[2] Principal is Norfolk Southern Railway Co.
[3] Surety is New Hampshire Ins. Co.
[4] Surety is Peerless Ins. Co.

BON-3-03

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

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19 CFR Part 177

(T.D. 83-116)

Tariff Classification of Footwear

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final Position and Guidelines.

SUMMARY: This document sets forth: (1) Customs position regarding the proper interpretation of provisions in the Tariff Schedules of the United States pertaining to imported footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper, and (2) guidelines relating to the characteristics of foxing and a foxing-like band.

EFFECTIVE DATE: June 22, 1983.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

By notice published in the Federal Register on January 25, 1982 (47 FR 3375), Customs solicited public comments regarding: (a) the interpretation of the exclusionary parenthetical clause in the supe-

rior heading to item 700.56, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), pertaining to imported footwear having "foxing or a foxing-like band" applied or molded at the sole and overlapping the upper; and (b) whether Customs should change its uniform and established practice of classifying shells for "moon boots", a type of footwear, imported with an equal number of removable liners as separate tariff entities, dutiable individually, or whether the shells and liners should be classified as tariff entities pursuant to the doctrine of entireties. Interested parties were given until March 26, 1982, to submit comments on the proposal. Pursuant to a request to extend the period of time for the submission of comments, Customs published a notice in the Federal Register on March 22, 1982 (47 FR 12194), extending the period of time to April 26, 1982.

Because of the numerous substantive and conflicting comments received in response to the more significant issue of question (a) relating to foxing, question (b) relating to the issue of entireties was treated separately. Question (b) was the subject of a document prepared for publication in the Federal Register, in which Customs held that moon boots with separable liners are entireties for tariff purposes.

The issue raised in question (a) of what constitutes "foxing or a foxing-like band," which is the subject of this document, has become more critical with the advent of the new TSUS classifications that replaced item 700.60, TSUS. Shoes which were dutiable at 20 percent ad valorem now demand a rate from 37.5 percent to 67.4 percent (equivalent rate) depending on whether Customs finds them to (1) have "foxing or a foxing-like band" or (2) in the case of slip-on type shoes, have "a foxing or a foxing-like band wholly or almost wholly of rubber or plastics."

In view of the many divergent opinions held by the importing community, the domestic shoe industry, and Customs officers regarding the meaning of the terms "foxing" and "foxing-like band", Customs decided to solicit comments on the understanding of these terms within the footwear industry and the effect of such understanding on the tariff classification of footwear. Twenty-five comments were received in response to the notice of January 25, 1982. There follows a summary of these comments and Customs analysis and position, including Customs guidelines on the characteristics of foxing and a foxing-like band.

Position of Domestic Shoe Industry

The basic thrust of the arguments set forth on behalf of the domestic shoe industry is that the "foxing" language of the tariff schedules should be broadly construed.

(1) Position of Domestic Shoe Industry: "Foxing" Concepts

It is asserted that the language of the TSUS "foxing" provisions is broad enough to cover two basic concepts of foxing, namely, "heel cap" foxing and "sole/upper reinforcement" foxing.

The basic purpose of both types of foxing is to reinforce the shoe at a point of particular wear of stress (*i.e.,* the back of the heel or the sole/upper juncture) and thus assure the shoe's structural integrity. The "heel cap" type of foxing has its classic application in traditional leather shoemaking while the "sole/upper reinforcement" type developed with the advent of the use of non-leather materials in footwear manufacture.

(2) Position of Domestic Shoe Industry: Foxing-Like Band

There is no standard trade definition for the term "foxing-like band." However, it is necessarily broader in scope than "foxing." Webster's New International Dictionary 2d. ed. (1943), p. 1431, defines "like" as an adjective:

> Having the same, or nearly the same, appearance, qualities or characteristics, similar;

Webster's New Twentieth Century Dictionary 2d. ed. (1961), p. 1048, defines "like" as:

> Similar, having the same or nearly the same qualities, characteristics, etc.

Therefore, a "foxing-like band" has the same, or nearly the same appearance, qualities or characteristics of "foxing." It follows that something which is molded to look like "foxing" is "a foxing-like band" even if it performs no function whatsoever. Undoubtedly, Congress understood this, and used "foxing-like band" to broaden the historical protection afforded the domestic shoe industry through the foxing parenthetical exception. A non-functional design or structural feature which simulates the appearance of "foxing" is "a foxing-like band."

(3) Position of Domestic Shoe Industry: Unit Molded Construction

The use of unit molded bottoming materials (*i.e.,* plastic or rubber bottoms in which the heel and sole are molded as a single unit) has grown in importance in recent years in connection with the production of both leather and non-leather footwear, especially so-called "casuals."

Unit molding encompasses two distinct manufacturing processes. In pre-molded construction, a pre-formed molded unit sole is separately attached to the upper after lasting. In direct molding, the molded sole is, at the time of its formation, molded directly to the assembled and lasted upper in a single step. When the soling compound is introduced into the mold in liquid form, the process is often called "direct injection molding." In both, there is by design a

"foxing or a foxing-like band . . . molded at the sole and overlapping the upper."

In order to make the shoe conform to the shape of the wearer's foot as well as to disperse the tension exerted on the sides of the upper by the sole during wearing, lasts [*i.e.*, the foot-shaped forms around which shoes are constructed] are uniformly engineered with varying degrees of convex curvature along the bottom (sole side) of the last. Unit molded soles are unique in that they are always specifically engineered to contain a "cupping radius," that is, a concave curvature along the top surface of the mold corresponding to the numerous points of radius of the bottom of a specific last. Because a cupping radius is present, the unit sole appears roughly U-shaped in cross section. The "U-shape" permits the sole to ensconce the lasted upper, thus assuring total superposition and complementary adhesion of sole and upper. It should therefore be obvious that the cupping radius in unit molded footwear is indicative of "foxing or a foxing-like band." Clearly, the cupping radius is integral to the formation of foxing. Without the cupping radius, the shoe would be structurally unstable at the juncture of sole and upper.

The Customs Service has held that particular unit molded shoes had "foxing or a foxing-like band . . . molded at the sole and overlapping the upper" for the reason that the shoes involved have a unit sole with a lip or flange which extended well above the feather line.

According to the domestic shoe industry, this line of reasoning, to wit, presenting the issue of "overlap" as a question of degree and of external appearance, is erroneous for several reasons. First, the TSUS language does not specify that a certain amount of overlap must be present, nor does it require "foxing or a foxing-like band" to resemble foxing on the outside of a sneaker. The TSUS requires only that foxing or a foxing-like band be present, and that there be "overlap of the upper."

Second, the presence of a lip or flange is sufficient, but not a necessary condition of having a foxing. If there is a lip or flange, there will be foxing, but a lip or flange need not be present for there to be a foxing. A lip or flange is an extension of the foxing in a unit molded sole. The foxing itself is present in the sole because the unit molded bottom is U-shaped in cross section.

A foxing or foxing-like band in a unit molded sole may "overlap the upper" in either or both of two ways. First, the foxing could, by virtue of an extended lip or flange, extend above the feather line.

There can be no doubt that, in such a case, the foxing of the unit sole would "overlap the upper." But in addition to this type of overlap, a unit sole will always "overlap the upper" by virtue of its cupping radius, even if no lip or flange is present. In the shoe industry, "upper" is more than the shoe material above the feather line which is exposed to view in the finished product. Upper also includes a "lasting allowance" of material which is turned under at

the feather line and secured to the bottom of the insole and the top of the molded unit sole. Because a unit sole is, by virtue of its cupping radius, U-shaped in cross section, there will always be an overlap of the upper below the feather line.

Customs has always taken the position that a foxing-like band "overlaps the upper" only when it overlaps the exterior surface area of the upper (*i.e.*, extends above the feather line). There is no basis in reason or law for restricting the foxing exclusion in this manner. While the feather line test is implicit in the expressed statutory requirement that Customs classify footwear on the basis of the proportional composition of the "exterior surface area" of the upper, the foxing exclusion contains no such language. Thus, Congress must have recognized that a foxing need not extend over the feather line to accomplish its function of reinforcing and supplementing the attachment of sole and upper. While indeed the vast majority of unit molded footwear does have a lip or flange extending above the feather line, all unit molded footwear has a cupping radius or "U-shape" which creates, in the plain sense of the term, an "overlapping of the upper."

(4) Position of Domestic Shoe Industry: Slip-Lasted (California) Construction

The slip-lasted (California) construction is utilized mainly for casual shoes and sandals; a classic example is a fabric, leather or plastic casual shoe, either closed upper or open toe/open back, with an insole or unit blended insole, an outsole, wedge or heel.

The slip-lasted method is similar to autoclave construction in that it incorporates a foxing or functional foxing-like band as an intrinsic design feature. As with autoclaved footwear, the purpose of this foxing or foxing-like band is to provide structural integrity to the shoe by reinforcing the attachment of the sole and upper.

It is argued that the incorporated foxing strip constitutes a "foxing or a foxing-like band applied . . . at the sole and overlapping the upper." The material resembles a traditional sneaker foxing and serves the function of a foxing, namely, the securing and reinforcement of the attachment of the sole to the upper. Thus, the foxing furnishes the major connection between upper and sole. Moreover, it is clear that a slip-lasted foxing or foxing-like band is a distinct component "applied at the sole and overlapping the upper." Although the production process requires that the foxing strip first be stitched to the upper material and then cemented or otherwise attached to the bottom of the unit blended insole assembly, it is certainly "applied . . . at the sole" inasmuch as it is secured between insole and outsole, as in the traditional autoclaved sneaker. Furthermore, because the foxing strip is stitched at a point above the insole and then turned down, there will necessarily be an "overlapping of the upper."

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(5) POSITION OF DOMESTIC SHOE INDUSTRY: LEGISLATIVE INTENT

An analysis of the legislative history of the 1963 TSUS foxing provision demonstrates that:

(1) Congress intended the provision to have an application coextensive with its broad commercial meaning;

(2) Congress must be presumed to have known that in 1963, the term "foxing" was not confined in meaning to the vulcanized band characteristic of sneakers;

(3) The 1960 Tariff Commission Study's specific mention of a sneaker-like vinyl shoe in describing the intent of the foxing exclusion does not imply that the exclusion of such shoes exhausted the intent of the exception; and

(4) To the contrary, the broad language chosen and Congress' manifest desire to maximize the protection afforded the domestic rubber footwear industry by making all shoes competitive with U.S. made footwear subject to the American Selling Price (ASP), convincingly shows that Congress intended the TSUS language to apply to all footwear containing any type of foxing or foxing-like bands.

(6) POSITION OF DOMESTIC SHOE INDUSTRY: TRADE AGREEMENTS ACT OF 1979

An expansive meaning of the foxing provision is also supported by Congress' use of language in recent statutory amendments which is similar to the foxing language found in item 700.55, TSUS.

Specifically, item 700.60, TSUS, was replaced with items 700.57 through 700.71, TSUS. These new item numbers became effective on July 1, 1981. One of the new TSUS items (700.59) and the superior heading to three others (700.61–700.63) contain foxing language similar to that in the superior heading to items 700.54 and 700.56, TSUS. In the case of the headings to items 700.61–700.63, TSUS, the language is nearly identical. However, item 700.59 contains a similar foxing exclusion with a significant modification which specifies that the foxing or foxing-like band be wholly or almost wholly of rubber.

The March 1981 Summary of Trade and Tariff Information on Rubber Footwear (USITC Publication 841) explains that items 700.61–700.63, TSUS, were "primarily intended to cover joggers." A true "jogger" (a shoe designed for running) has a sole containing a wedge heel which is attached to the upper with cement only and overlaps the upper only at the heel and toe (unlike a traditional sneaker). These shoes are not unit molded and the soles are not molded to a specific last.

The popularity of the true "joggers" has spawned an injection molded variety. Injection molding requires the use of a specific last with numerous points of radius and necessarily incorporates a cupping radius and a foxing or foxing-like band within the mold. The manifest purpose of the exclusionary language of the headings to

items 700.61–700.63, TSUS, is to assure that these cheaper molded shoes are dutied at the generally higher rates applicable to items 700.64–700.71, TSUS, the general "other" category, which includes sneakers and tennis shoes and all others having "foxing or a foxing-like band."

The International Trade Commission report (USITC Publication 841) also explained that one of the various shoe types covered by item 700.59, TSUS, is the so-called "espadrille." Imported varieties of these slip-on casuals are made using a variety of construction techniques, including the slip-lasted (California) construction method and are distinguished by the fabric (usually jute) band securing the attachment of the sole to the upper. It is important to note that the language of item 700.59, TSUS, impliedly recognizes that regardless of how the espadrille is constructed this jute band is, in fact, a foxing or foxing-like band, for it specifically excludes from coverage under item 700.59, TSUS, only those shoes having a "foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper;" by negative implication, a shoe with foxing of fabric (*e.g.* jute) remains classifiable under item 700.59, TSUS.

Clearly, a slip-lasted shoe containing a plastic rather than jute foxing strip contains a type of foxing which disqualifies it from classification under item 700.59, TSUS. Because a shoe containing foxing of any composition may not be classified under items 700.61–700.63, TSUS, the only alternative is to classify such a shoe under items 700.64–700.71, TSUS, the general "other" category which includes sneakers. Similarly, if the upper of the slip-lasted shoe is over 90 percent by surface area of rubber or plastics, it may not be classified under items 700.56, TSUS, because of the general foxing exclusion contained in the superior heading to that item. The only alternative is to classify such a shoe under items 700.64–700.71, TSUS.

In the Trade Agreements Act of 1979 (Pub. L. 96–39, section 223(b), 93 Stat. 144, 204), Congress used foxing language substantially similar to that employed in 1963, but in particular contexts which convincingly negate the suggestion that the phrase "foxing of foxing-like band" was or is confined to the type of vulcanized rubber sole/upper reinforcement characteristic of sneakers. Rather, these recent TSUS amendments conclusively demonstrate that the foxing language has consistently been intended to have broad application to all types of foxing or foxing-like bands.

(7) Position of Domestic Shoe Industry: Moon Boots

One of the commenters representing the domestic shoe industry noted that a moon boot involved in the foxing issue is a unit sole construction having a pre-molded unit sole stitched to a non-molded upper. The sidewalls of the unit sole extend upward from the sole bottom for several inches before being stitched, at the top of the sidewall, to a non-molded upper. Customs, in Ruling Nos.

051928 and 062391, dated December 1, 1977, and September 14, 1979, respectively, found that the sidewalls of the moon boot did not overlap the upper and consequently classified it under item 700.56, TSUS.

However, according to the commenter, in Ruling No. 056047, dated June 21, 1978, Customs found that a practically identical moon boot, except that the stitched-in lining extended down below the insole, had a foxing which overlapped the upper and therefore classified it under item 700.60, TSUS. In so doing, Customs apparently concluded that a pre-molded unit sidewall overlaps the upper only if the sidewall extends above the point on a shoe at which Customs considers the exterior surface area of the upper to begin, to wit, at the bottom of the insole. Nothing in the statute, its legislative history, or any judical decision gives the slightest suggestion that the overlapping of the upper by the foxing must only occur at the insole.

Plainly, the test should not depend on where the overlapping occurs, but rather if there is any overlapping of the upper by the foxing, for that is what the tariff provision requires.

There is only one reasonable and logical way of construing the foxing exclusionary clause in a fashion which is consistent with its legislative history and does not expand upon the words of the provision itself. The overlapping of the upper can occur at any point where the upper material is overlapped by the foxing, whether that be at, below, or above, the insole.

One commenter states that a moon boot having a band with the appearance of a foxing molded into the unit bottom at the point where the sole/upper joint would ordinarily be, possesses a "foxing-like" band. The same would be true if the boot possesses simulated "heel cap" foxing.

Another commenter would exclude from classification under item 700.56, TSUS, a moon boot having a raised cast in the mold design which is molded at the sole, overlaps the upper (the remainder of the sidewall over which the raised design is superimposed), and presents a foxing-like appearance.

Position of Importers

The major premise underlying the arguments presented on behalf of the importers is that the foxing provisions of the TSUS should be interpreted narrowly.

(1) Position of Importers: Legislative Intent

Some importers take the position that the limited legislative history confirms the fact that the only footwear to be affected by the exclusionary language was confined to the traditional sneaker or tennis shoe.

Other importers take a more liberal view asserting that the exclusionary language which precedes item 700.56, TSUS, was intend-

ed by Congress to preclude classification in that provision and its predecessors of imported footwear with plastic uppers "having the general outward appearance of the traditional sneaker or tennis shoe."

One commenter expressed the view that the legislative intent was accurately expressed in the following excerpt from the March 1981 Summary of Trade and Tariff Information on Rubber Footwear (USITC Publication 841).

> Item 700.59 provides for slip-on footwear and footwear with open toes or open heels. Items 700.61–700.63 provide for footwear that is held to the foot with the use of laces, buckles, or other fasteners and that is of cement construction and is primarily intended to cover joggers. Items 700.64, 700.67, 700.69, and 700.71 provide for similar footwear of other than cement construction, and primarily covers sneakers or tennis shoes. Item 700.57 in the new nomenclature provides for certain protective footwear.

Another commenter pointed out that the limited scope of the phrase "foxing or foxing-like band" is confirmed in the August 1979 analysis of the Multilateral Trade Negotiations (MTN) Customs Valuation Agreement, which confirms that the intent was to separate sneaker type shoes (TSUS items 700.64–700.71) from joggers (TSUS items 700.61–700.63) through the utilization of foxing terminology. (Committee on Finance, U.S. Senate MTN Studies 6, Part 2, p. 78).

In order to reinforce their position that an exclusionary clause in the tariff schedules should be narrowly interpreted, several commenters noted that it is of special significance that the Customs Court [now the Court of International Trade] found that an exception clause in a statute must be strictly construed in accordance with the legislative purpose underlying the statute. *International Seaway Trading Corp.* v. *United States,* 69 Cust. Ct. 144, C.D. 4385 (1972); *Canadian Pac. Ry. Co.* v. *United States,* 73 F.2d 831, 834 (CCA 9, 1934).

(2) POSITION OF IMPORTERS: COMMON AND COMMERCIAL MEANING

It is a fundamental principle of customs law that tariff terms are to be construed in accord with their common meaning except that a different commercial meaning shall prevail in the absence of a clearly expressed legislative intent to the contrary.

The common meaning of the term "foxing" connotes trim added to the upper of a shoe. However, the common meaning is limited to leather footwear.

It is claimed that the common meaning was not intended by Congress because only rubber soled footwear is involved and the exclusionary language covers only those forms of foxing applied or molded at the sole and overlapping the upper.

The term "foxing" has a different more precise meaning, a commercial designation, which applies to rubber soled footwear with

fabric uppers. A commercial designation which differs from the common meaning prevails over the common meaning. *American Express Co.* v. *United States,* 10 Ct. Cust. Appls. 295, T.D. 38680 (1920).

Commercial designation is established through sworn testimony of those experienced in buying and selling the merchandise at wholesale. *Daniel Green Shoe Co.* v. *United States,* 58 Cust. Ct. 7, C.D. 2868 (1967) Appeal dismissed, 54 CCPA 143 (1977). It is also established through reference to published materials such as the American Footwear Industries Association pamphlet entitled "The Art and Science of Footwear Manufacturing" (New York 1974), which defines the foxing in issue. See *Dolliff & Company Inc.* v. *United States,* 59 CCPA 101, C.A.D. 1047 (1972).

Based on such sworn testimony and reference to published materials defining foxing, it has been established that the commercial meaning or the trade understanding of the term "foxing" is that it is a strip wrapped around a shoe at the point where the upper and sole are joined. It is a component separate from either the sole or the upper and secures the sole or bottom and upper.

One commenter noted that a different definition for foxing exists. That definition is found in a B. F. Goodrich Company pamphlet entitled "Canvas Rubber and Koroseal Footwear Definitions" (1959). Foxing in that publication is described as:

> A thin narrow strip of material wrapped around the shoe upper, where it is joined with the outsole, which is folded under before attaching the outsole to the upper.

It is claimed that this type of foxing does not fall within the exclusion because it does not overlap the upper, which connotes an extension from one location to another. In this "foxing under" method the strip does not extend to the upper, but merely covers the upper, therefore, there is no overlap.

(3) POSITION OF IMPORTERS: CHARACTERISTICS OF FOXING

A foxing is a strip of material which has the following characteristics:

(1) Is separate from the sole or upper;

(2) Covers and secures the joint between the sole and upper;

(3) Overlaps the upper and covers the juncture between the sole and upper. [One commenter suggests that the overlap should be significant and readily discernible to the eye, and should be more than *de minimus.* Anything less than ⅛ inch "overlap" should be considered *de minimus*];

(4) Is a band, *i.e.,* "a strip serving to join, hold together or integrate two or more things . . . a thin, flat encircling strip, strap, or flat belted material serving chiefly to bind or contain something";

(5) Encircles the entire shoe;

(6) Is attached by vulcanizing. [Another commenter states that foxing may be attached by any means including cement, stitching, vulcanizing or molding];

(7) Excludes components known by another name clearly recognized in the trade, such as mock welts, toe bumpers, mud guards, wedge wraps, California construction, and platform wraps; and

(8) Excludes unit molded bottoms.

In doubtful cases it is appropriate to look at the general class of footwear intended to be covered by the tariff provisions involved in order to avoid a result which is obviously not in harmony with legislative intent.

(4) Position of Importers: Characteristics of a Foxing-Like Band

(1) There is no trade understanding or commercial designation for the term "foxing-like band."

(2) Some of the briefs submitted on behalf of shoe importers indicate that a foxing-like band must be a separate component. Other submissions maintain that there need not be a separate band. For example, foxing-like bands may be found on many sneakers with rubber or plastic uppers including shell molded and injected molded varieties.

(3) A foxing-like band does not secure the joint between sole and upper. However, there is disagreement among the importers on this point. One commenter asserts that a foxing-like band must itself reinforce or supplement the juncture between the sole and upper of the footwear or must so closely simulate that function as to cause a person to reasonably believe that the foxing-like band is there solely for the purpose of reinforcement or to supplement.

(4) A foxing-like band must be applied or molded at the sole and must overlap the upper.

(5) A foxing-like band may be attached by methods other than vulcanization.

(6) The term "foxing-like" does not mean a "simulated" foxing, but instead applies to that which has the same, or nearly the same appearance, qualities, or characteristics as a true foxing appearing on a traditional tennis or sneaker-type shoe.

(7) The common meaning of the term "foxing-like band" is that it differs from "foxing" per se only with respect to functionality.

(8) A foxing-like band is usually cemented rather than molded.

(5) Position of Importers: Interpretation of Phrase "Molded At"

The phrase "molded at" does not cover injection molded processes. Rather, it describes processes in which a foxing, created separate from the sole, is vulcanized to the sole and upper rather than merely cemented. As used in the parenthetical exception, molded is a synonym for vulcanized.

The phrase "molded at" does not require that the commercial meaning of the term "foxing", as a component separate from the sole or upper, be abandoned. Properly understood, it compliments the commercial meaning. Reading "molded at" as a synonym of vulcanized is consistent with the legislative history which clearly explains the parenthetical exception as a description of the traditional sneaker or tennis shoe, a form of footwear constructed with a foxing.

(6) Position of Importers: Footwear With Unit Molded Soles

Footwear with unit molded soles do not have a foxing or a foxing-like band for the following reasons:

(1) There is no band which is applied to or molded at the sole.

(2) There is no strip separate from the sole or upper.

(3) To the extent that the molded sole overlaps the upper and covers the juncture between the sole and the upper, such overlap is *de minimus.*

(4) The overlap is not functional, but rather a result of stylistic considerations.

(5) The appearance of casual footwear made by this construction is foreign to sneakers and other athletic footwear.

In Customs Ruling No. 068764 dated August 14, 1981, footwear with a unit molded bottom was said to have a foxing because the sole extended higher than the point at which the upper turned under the insole.

The importers assert that footwear with unit molded soles has neither a foxing nor a foxing-like band. The so-called foxing is in reality a part of the sole. It is not a separate component. It is not a band. It is not applied or molded at the sole. It is a part of the sole. The lip or edge of the sole cannot cover the seam between the sole and the upper because it creates that seam.

With respect to the lip, another commenter maintains that the lip does not perform the function of a foxing in that it does not overlap the upper as foxing does nor does it strengthen the joint between the upper and sole. Such strengthening is unnecessary because of the cement process.

Another commenter claims that evidence that a lip is not foxing is found in the headnote to item 700.61, TSUS, et seq. There are two exception clauses designed to separate "joggers" from sneaker type shoes, "footwear having a foxing or foxing-like band applied to or molded at the sole and overlapping the upper" and "footwear with soles which overlap the upper other than at the toe or heel." If, in fact, a lip or ridge which is in effect part of the molded shell bottom of an injected molded piece of footwear is foxing or a foxing-like band, there would be no need for the second exception of soles overlapping the upper. In fact, this second exception correctly describes a product in which the sole extends upward so that it may overlap the upper and clearly indicates such construction is not properly defined as "foxing or a foxing-like band."

(7) Position of Importers: Footwear of the Slip-Lasted (California) Construction

Footwear of the slip-lasted (California) construction does not contain a foxing or a foxing-like band within the established definition for the following reasons:

(1) The strip of material, or wrap does not secure the joint between the sole or upper. In fact, the strip does not overlap the sole at all,

(2) The strip or wrap cannot be said to be a "foxing-like band" since without covering the juncture between the sole and the upper it cannot be said to simulate functional "foxing", and

(3) The appearance of casual footwear made by this construction is foreign to "sneakers" and other athletic-type footwear.

(8) Position of Importers: Mud Guards, Wedge Wraps, Platform Wraps, etc.

Mud guards, wedge wraps, platform wraps, etc., are entirely stylistic and do not function as foxing or simulate foxing. They do not come within the purview of the exclusionary language for the following reasons:

(1) These features are known in the trade as "mud guards," "wedge wraps," "platform wraps," etc., rather than as "foxing or foxing-like bands";

(2) These features do not cover or secure the joint between the sole and the upper; and

(3) Perhaps most important, these constructions are foreign to "sneakers" and other athletic-type footwear and, therefore, fall outside the tariff understanding of the term "foxing or foxing-like band".

(9) Position of Importers: Moon Boots

Moon boots do not contain a foxing or a foxing-like band for the following reasons:

(1) They are not within the class of footwear which Congress intended to protect;

(2) There is no separate piece of material used to join the bottom of the boot to the upper or which is used to strengthen the joint between the sole and the upper as those terms are understood by Customs and the moon boot industry;

(3) If one considers the joint between the sole and the upper to be the point where the insole ends, the sides of the molded shell bottom simply constitute the joint itself and are not applied separately as a foxing; and

(4) If one considers the juncture between the sole and upper to be the point where the pre-molded shell bottom ends and the stitched portion of the boot begins, there is, again, no piece of material reinforcing this joint.

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A plastic non-functional lip or ridge molded parallel to the sole of the one piece bottom should not be considered foxing for the following reasons:

(1) There is no structural difference between the one piece molded shell bottoms which have the ridge and those that do not. Where a ridge exists, it is there for purely stylistic purposes and has no useful function;

(2) Not only does the lip not serve to cover the joint between the sole and upper, it does not overlap the sole, rather it is part of the bottom. Where a lip exists in the molded shell bottom, it is usually a decorative strip half-inch to an inch above the sole. This has no structural or functional resemblance to a foxing or foxing-like band; and

(3) The lip or ridge bears no resemblance to the foxing or foxing-like band found on sneakers or tennis shoes.

It has also been pointed out that in some instances because the bottom of the ornamented strip is above the insole platform, it is a part of the upper and therefore cannot overlap itself.

The classification of a vinyl upper plastic shell bottom moon boot should not depend on the existence or position of a ridge which has no practical function, nor on basic design characteristics which have no component recognizable as foxing.

Customs Position

The relevant TSUS provisions provide as follows—

> Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:
>
> * * * * * * *
>
> Other footwear (except footwear having uppers of which over 50 percent of the exterior surface area is leather):
>
> Having uppers of which over 90 percent of the exterior surface area is rubber or plastics (except footwear having *foxing* or a *foxing-like band* applied or molded at the sole and overlapping the upper) (emphasis added):
>
> 700.54 Zoris (thonged sandals).
>
> 700.56 Other.
>
> * * * * * * *
>
> 700.59 Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear provided for in item 700.57 and except footwear having a *foxing* or *foxing-like band* wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper (emphasis added).

700.61-.71 Other: Footwear having soles (or midsoles, if any) of rubber or plastics which are affixed to the upper exclusively with an adhesive (any midsoles also being affixed exclusively to one another and to the outsole with an adhesive); the foregoing except footwear having a *foxing* or *foxing-like band* applied to or molded at the sole and overlapping the upper and except footwear with soles which overlap the upper other than at the toe or heel: (emphasis added).

The first issue to be resolved relates to a determination of the meaning of the terms "foxing" or "foxing-like band" as they pertain to rubber soled footwear with fabric uppers.

It is a cardinal principle of customs law that tariff terms are to be construed in accordance with their common meaning unless there is a different commercial meaning. In such cases, the latter shall prevail in the absence of a clearly expressed legislative intent to the contrary. *Jas. Akeroyd & Co. et al.* v. *United States,* 15 Ct. Cust. Appls. 440, T.D. 42641 (1928); *United States* v. *Fung Chong Co.,* 34 CCPA 40, C.A.D. 342 (1964).

The common meanings of the term "foxing" as the term is traditionally used, have been defined as follows:

> A piece of leather put on the upper leather of the shoe along the edge next to the sole. Funk and Wagnalls' New Practical Standard Dictionary (1958).
>
> A piece of material applied to the upper or extending around the outsole of a boot or shoe. Webster's Third International Dictionary (1961).

These common or traditional definitions of foxing relate to leather footwear. Inasmuch as the provision covers foxing applied or molded at the sole and overlapping the upper, it is clear that Congress did not intend that the term "foxing" be construed in accord with its common meaning. In view of this inconsistency, it is equally clear that Congress went beyond the common or traditional meaning of the term "foxing" and adopted a more precise meaning found in the commercial designation of the term as it applied to rubber soled footwear with fabric uppers. A commercial designation which differs from the common meaning prevails over the common meaning. *American Express Co.* v. *United States, supra.*

Commercial designation may be shown through reference to trade publications. See *Dolliff & Company, Inc.* v. *United States, supra.* For example, relevant definitions from trade publications are as follows:

> With rubber soled canvas upper shoes, foxing is usually a strip of rubber covering the joint between the sole and upper. The Art and Science of Footwear Manufacturing (American

Footwear Industries Association 1974). A thin narrow strip of material wrapped around the shoe upper, where it is joined with the outsole, which is folded under before attaching the outsole to the upper. B. F. Goodrich Company pamphlet entitled "Canvas Rubber and Koroseal Footwear Definitions" (1959).

The above-cited definitions encompass the commercial or trade understanding of foxing. However, it is contended that the B. F. Goodrich definition does not fall within the exclusionary language because the strip does not overlap the upper, which connotes an extension from one location to another. It is Customs view that the B. F. Goodrich definition satisfies the exclusionary language because the strip can be considered as being applied at the sole, noting that it is folded under at the juncture of the sole and upper and it does extend upward thus overlapping the upper. It also acts to reinforce or supplement the juncture of the sole and upper.

The term "foxing-like band" has no commercial meaning. The meaning of "like" in customs usage connotes articles having the same, or nearly the same appearance, qualities, or characteristics. *Japan Import Co.* v. *United States,* 24 CCPA 167, T.D. 48642 (1936).

Thus, a foxing-like band has the same, or nearly the same appearance, qualities, or characteristics of foxing. It follows that something which is molded to look like "foxing" is "a foxing-like band" even if it performs no function. Undoubtedly, Congress used the term "foxing-like" to broaden the historical protection afforded the domestic industry through the foxing parenthetical exception.

Specifically, in using the term "foxing-like band", it is apparent that Congress intended to include rubber and plastic footwear that is not constructed with a traditional separate functional foxing. For example, certain injection molded sneakers have foxing-like bands. Upon completion, there exists a strip which covers what appears to be (but is not in fact) the joint between the upper and the sole. Unlike foxing, the foxing-like band is not a separate component but appears in all respects to be one. Thus, the foxing-like band envisioned by Congress applied to footwear constructed in a manner so that the end result was a shoe appearing to have the traditional foxing.

A sneaker with a shell bottom construction also has a foxing-like band. In that construction the sole is made or molded in one process and, rather than being merely the bottom or outsole portion, the molding process results in a cup-like unit (the sole) into which the upper is glued and sometimes sewn. The molded shell when affixed to the upper resembles in appearance and position a separately applied functional foxing.

The second issue relates to a determination of the types and characteristics of footwear which Congress intended to exclude from item 700.55, TSUS, the original predecessor provision to item 700.56, TSUS.

The Tariff Classification Study, Schedule 7, Explanatory and Background Materials (November 15, 1960), at page 214, contains the only direct reference to the parenthetical exception and reads as follows:

> The parenthetical exception "except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper" in item 700.55 is designed to ensure the classification in item 700.60 of a style of imported shoe with plastic coated uppers but having the general outward appearance of the traditional "sneaker" or tennis shoe.

In C.I.E. 187/64, dated January 31, 1964, Customs categorically stated that the parenthetical exception in item 700.55, TSUS, refers specifically to the traditional sneaker or tennis shoe.

The foregoing interpretation of the parenthetical exception was modified by Customs in C.I.E. 187/64 supp. #1, dated April 19, 1966, which was abstracted as T.D. 66–47(8). In that ruling, Customs took the position that footwear of the type normally classifiable under item 700.55, TSUS, but which have a functional or nonfunctional foxing or foxing-like band applied or molded at the sole and overlapping the upper, are precluded from classification under item 700.55 whether or not of the traditional "sneaker" or tennis type.

It remains Customs opinion that C.I.E. 187/64 reflects the correct interpretation of the exclusionary language. This view is further buttressed by the language found in item 700.59, TSUS, one of the replacement item numbers for item 700.60, TSUS, added by the Trade Agreements Act of 1979, which reads as follows:

> Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear provided for in item 700.57 and except *footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper.* (Emphasis added).

A reading of item 700.59, TSUS, which includes casual footwear of the slip-on type, indicates that such footwear may contain "a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlappng the upper." Consequently, it follows that the exclusionary language is not directed solely to sneakers or tennis type shoes.

Although the parenthetical exception in item 700.55, TSUS, was not limited by the legislative history to the traditional sneaker or tennis shoe, a limitation was contained therein. Specifically, shoes subject to the exclusionary language must have "the general outward appearance of the traditional 'sneaker' or tennis shoe." It is apparent that the distinguishing feature or the essence of this general outward appearance was the presence of *a visible outside foxing.* (Emphasis added).

It is contended by the domestic interests that Congress must be presumed to have known in the early 1960's that foxing was used in and was a characteristic of a variety of shoes including slip-lasted and unit molded construction and intended that such constructions would fall within the parenthetical exception. In fact, the claim is also made that the language applies to all footwear containing any type of foxing or foxing-like bands. Further, the fact that this legislative history specifically mentioned a sneaker-like vinyl shoe in describing the intent of the foxing exclusion does not imply that the excluson of such shoes exhausted the intent of the exception.

A fair reading of the legislative history of the parenthetical exception in item 700.55, TSUS, quoted previously, gives no indication that all foxing constructions were to be encompassed by the exception. It is obvious that if Congress had intended the exception to include all types of foxing, such an intention would have been clearly expressed in the legislative history.

Further, it appears that an expansive interpretation of the parenthetical exception runs contrary to judicial precedent. See *International Seaway Trading Corp.* v. *United States,* 69 Cust. Ct. 144, C.D. 4385 (1972) and *Canadian Pac. Ry. Co.* v. *United States, supra,* which, as noted earlier, expressed the principle that an exception clause in a statute must be strictly construed in accordance with the legislative purpose underlying the statute.

Inasmuch as the foxing on the traditional sneaker or tennis shoe visibly overlapped the upper, Customs must necessarily conclude that unit molded footwear with plastic uppers do not, per se, have the type of visible outside foxing contemplated by the statute and consequently do not fall within the parenthetical exception.

It is also Customs view that footwear of the slip-lasted (California) construction does not contain foxing or a foxing-like band. This is so because this type construction does not exhibit a visible foxing which resembles that found in the traditional sneaker or tennis shoe. Consequently, such footwear does not contain foxing or a foxing-like band for tariff purposes.

The third issue relates to a determination of whether moon boots of a particular construction possess foxing or a foxing-like band.

The moon boot involved is a type of footwear designed to protect the feet from snow and cold. It is often worn as an "apres-ski" boot. It has a pre-molded rubber/plastic shell bottom, the sides of which extend up to 4 inches from the sole. This shell bottom is ultimately stitched to a polyurethane upper. An inserted polyfoam liner is permanently stitched at the top of the polyurethane upper. There are no design features such as a lip or ridge molded in the shell bottom which could be considered a foxing-like band.

This type of moon boot was the subject of an American manufacturer's petition asking that it be reclassified under item 700.60, TSUS, or item 700.53, TSUS. That request for reclassification was

rejected by Customs in T.D. 81–79, published in the Federal Register on April 13, 1981 (46 FR 21741).

One commenter has renewed the argument that this type of moon boot possesses foxing or a foxing-like band and consequently should be excluded from classification under item 700.56, TSUS. Customs will not now address this argument because its position in this matter is clearly established in T.D. 81–79.

A claim has been advanced that the above-described moon boot with the addition of a design feature such as a lip or ridge in the form of a band molded on the shell bottom at the point where the sole/upper juncture would ordinarily be, possesses a foxing-like band which would exclude it from classification under item 700.56, TSUS.

An analysis of the parenthetical exception indicates that for the design feature in the form of a band to be considered a foxing-like band, it must be molded at the sole and must also overlap the upper. It is noted that for definitional purposes, the sole and upper can be separately conceived. However, in actuality, that portion of the shell bottom where the design feature is placed is an integral part of the combined sole and upper. The design feature molded in the shell bottom can be considered as being molded at the sole because part of the feature lies below the point where the sole/upper juncture would ordinarily be. However, this design feature cannot be said to overlap the upper because it is an integral part of the combined sole and upper. Consequently, the design feature described cannot be considered a foxing-like band for tariff purposes.

Summary of Customs Position

(1) Footwear of unit-molded construction does not, per se, contain foxing or a foxing-like band for tariff purposes.

(2) Footwear of slip-lasted (California) construction does not possess foxing or a foxing-like band for tariff purposes.

(3) Moon boots of the type described in T.D. 81–79 and those with a lip or ridge molded in the shell bottom, do not have foxing or a foxing-like band for tariff purposes.

Customs Guidelines Relating to Characteristics of Foxing and a Foxing-Like Band

The following guidelines relating to the characteristics of a foxing or a foxing-like band are set forth as an aid to Customs officers in classifying specific footwear constructed with foxing.

Characteristics of a Foxing

1. A foxing is a strip of material which is separate from the sole and upper.

2. A foxing secures the joint between the sole and upper. It covers the joint but there may be other footwear with a "foxing

under" which does not cover the joint as in the B. F. Goodrich definition of foxing previously cited.

3. A foxing must overlap the upper and the overlap must be readily discernible.

4. A foxing is a band, *i.e.,* a strip serving to join, hold together or integrate two or more things . . . a thin, flat encircling strip, strap, or flat belted material serving chiefly to bind or contain something.

5. A foxing must encircle or substantially encircle the entire shoe.

6. A foxing may be attached by cementing, stitching, or vulcanizing.

7. A foxing does not include components known by another name clearly recognized in the trade such as mock welts, toe bumpers, wedge wraps, and platform wraps.

8. However, a mud guard may meet the definition of a foxing. It is usually applied at the sole and folded under at the juncture of the sole and upper and it does extend upward overlapping the upper. It also acts to reinforce or supplement the juncture of the sole and upper.

Characteristics of a Foxing-Like Band

There is no trade understanding or commercial designation for the term "foxing-like band."

1. The term "foxing-like" applies to that which has the same, or nearly the same appearance, qualities, or characteristics as the foxing appearing on the traditional sneaker or tennis shoe.

2. A foxing-like band need not be a separate component.

3. A foxing-like band may or may not secure the joint between the sole and upper.

4. A foxing-like band upper must be applied or molded at the sole and must overlap the upper.

5. A foxing-like band must encircle or substantially encircle the entire shoe.

6. A foxing-like band may be attached by any means.

7. Unit molded footwear is considered to have a foxing-like band if a vertical overlap of ¼ inch or more exists from where the upper and the outsole initially meet, measured on a vertical plane. If this vertical overlap is less than ¼ inch, such footwear is presumed not to have a foxing-like band.

Drafting Information

The principal author of the document was Jesse V. Vitello, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: May 6, 1983.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 23, 1983 (48 FR 22904)]

(T.D. 83-117)

Guidelines for Disposition of Violations of the Timely Entry Summary Filing Requirements—1983 Revision

1. INTRODUCTION

The following materials have been distributed throughout the Customs Service as Manual Supplement 4400-11, dated April 20, 1983. This Manual Supplement revoked Manual Supplement 4400-01, dated November 18, 1980, and promulgated new procedures and guidelines for disposing of violations of the timely entry summary filing requirements contained in Part 142, Customs Regulations (19 CFR Part 142) as authorized by sections 484(a) and 448(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1484(a) 1448(b)). Manual Supplement 4400-01 was also published at T.D. 80-298 which is revoked by this Treasury Decision.

2. BACKGROUND

When merchandise is released under sections 142.3(a) and 142.21, Customs Regulations (19 CFR 142.3(a), 142.21) before the entry summary is filed, the entry summary must be filed within 10 working days in accordance with sections 142.21(a) and 142.23, Customs Regulations (19 CFR 142.21(a), 142.23). An importer filing the entry summary late is subject to a demand for liquidated damages in the amount of the value of the goods plus any duties and taxes owing (see section 113.14(g) (1) and (2), Customs Regulations (19 CFR 113.14(g) (1) and (2)).

The demand is made using the CF 5955A and the violator offered the opportunity to petition for relief. Until January 1981, guidelines set forth in the Fines, Penalties and Forfeitures Handbook and section 172.22(d), Customs Regulations, had been applied in disposition of the cases.

With Manual Supplement 4400-01 (November 18, 1980), the Customs Service instituted new procedures designed to expedite the processing of so-called "late-filing" or "untimely-filing" cases. Violators have been given two options: (1) pay a specified sum, called a calculated mitigated amount; or (2) petition for relief.

The 1981 guidelines were designed to take advantage of the routine nature of the cases and the frequent lack of mitigating explanation for the violations. The new guidelines also raised basic mitigated or "penalty" amounts in most cases to a minimum $100.

Initially, violators paid the Option 1 amount under the 1981 guidelines and cases were processed more expeditiously. Over a period of time, however, it became apparent that there were cer-

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tain inequities in those guidelines, primarily in the calculated mitigated amounts. As a consequence, the Customs Service has undertaken a study of the guidelines and their effectiveness.

New procedures were tested and proposed revisions considered. Both field offices and importers were given an opportunity to comment on proposed changes. The following guidelines are the product of those efforts.

The basic option arrangement has been retained. The Option 1 amount, however, is calculated differently. Violators will be assessed an administrative charge of $50 plus interest on the withheld duty at the rate of .1 percent per calendar day that the entry summary and duty were late. Tables setting forth Option 1 interest amounts will be provided our field offices. Flat fees are to be assessed for duty-free entry summaries which are filed untimely.

Although the right to petition is protected, the bases upon which further relief will be granted in most cases have been substantially circumscribed. The CF 5955A late-filing notice has been amended to reflect this.

3. Policy Considerations

These new guidelines represent a refinement of Customs policy in late filing cases. These cases do not per se represent a major enforcement problem. Although they may occur in substantial numbers in some districts, the violations are generally routine and not in any sense part of an ongoing scheme to defraud the revenue. If, on the other hand, Customs should discover evidence of fraud in a particular case, there are other more severe sanctions at our disposal.

What has emerged is the realization that, because an importer for whatever reason is borrowing the duty from the government for the length of time the entry summary and duty are late, Customs should mitigate liquidated damages amounts based in part upon a reasonable interest charge for the time the duty is withheld. There is, of course, an expense to the government to process the late entry and the requirement that a mitigated amount also serve to discourage future violations.

We have calculated the basic average cost to Customs for processing a late filing case to be $50. That is the administrative fee we will charge under these new guidelines. The annual percentage rate of 36.5 percent is certainly higher than an importer would obtain elsewhere. The two charges together constitute a sufficient deterrent to maintain compliance levels nationwide.

The final step of limiting the bases upon which further relief will be granted will serve to discourage frivolous petitions and ultimately to make administration of our late filing procedures much more efficient and productive. Importers may look to these guidelines and determine what an untimely filing will cost and know as a certainty the limits of relief they can expect.

We expect the end result of this new procedure will be an appropriately less visible place in Customs operations for late filing cases and ultimately an overall reduction in their occurrence.

4. ACTION

Commencing May 1, 1983, the Customs Service shall issue demands for liquidated damages for failure to file entry summaries timely in accordance with the following instructions.

a. *Modified CF 5955A.* Notices of Liquidated Damages Incurred (CF 5955A) shall be issued on the modified form attached as Attachment A—1983 Revision (Attachment A may be photocopied or the information may be typed on each CF 5955A at the discretion of each field office). The modified form specifies two options from which the petitioner may choose to resolve the demand made against him.

(1) *Option 1.* He may pay a specified sum within 60 days and the case will be closed. By electing this option in lieu of petitioning, he waives his right to file a petition. He may, however, file a supplemental petition, if he does so in accordance with the Customs Regulations and has some new fact or information which merits consideration in accordance with these guidelines.

(2) *Option 2.* The second option is to file a petition seeking presumably more relief than would be had by paying the mitigated amount specified.

(a) When the entry summary is late by less than 30 days, the District or Area Director shall grant further relief *only* when the petitioner has demonstrated either

(1) That the violation did not occur; or

(2) That it was the result of Customs error.

(b) When the entry summary is late by 30 days or more, the District or Area Director may consider the following factors in response to a petition for further relief:

(1) The circumstances causing the delay;

(2) The extent of the lateness;

(3) The amount of duty involved (the higher the amount of withheld duty the greater the advantage to the violator, and as a corollary, the longer it is withheld the greater still the advantage);

(4) The past record of the importer or broker in filing entry summaries timely; and

(5) The importer's or broker's lack of intent to file his entry summary untimely (an uncorroborated statement to this effect would generally be insufficient).

(6) Ordinarily, mitigation granted under Option 2 shall not be in an amount less than the amount determined in accordance with Option 1 unless the petitioner has presented extraordinary mitigating factors which justify so doing.

b. *Calculation of Mitigated Amount.* The amounts to be set forth under Option 1 on the CF 5955A shall be calculated as follows:

(1) *Dutiable Entry:* entry summary filed late:

The importer of record shall be charged an administrative fee of $50 plus interest on the withheld duty at the rate of .1 percent (.001) per calendar day that the entry summary and/or duty were late. The interest amount shall be rounded *up* to the next dollar. For purposes of this calculation the duty amount shall be rounded *down* to the next dollar (see paragraph h. below for further explanation).

(2) *Entry for which there is No Withheld Duty* (including duty-free entry and dutiable entry rejected, refiled late with no withheld duty):

Entry summary filed late: $50.

c. *Date-Stamping or Receipt System.* To the extent possible and necessary, each district will establish procedures to date stamp entry summaries when filed in the presence of the person filing the summary or provide a receipt (validated broker copy) for the summary filed. These procedures will serve to eliminate claims in one-day late cases that Customs misstamped the date of presentation.

d. *Entry Summary Not Filed.* If at the time the demand for liquidated damages is issued the entry summary has not been filed, the full amount of liquidated damages shall be assessed and no mitigated amount shall be offered under Option 1. A prerequisite for any mitigation under these guidelines is that the entry summary has been filed and the duty deposited. Therefore, no demand will be mitigated until the summary is filed and the duty deposited.

e. *Second Offenses.* These guidelines provide for charging an administrative fee plus interest for each late filing case. Accordingly, the fact that a violation is a second or greater offense is important only to determine an importer's record within the context of 3.a.(2)(b) above. If an importer frequently abuses his privileges and fails to meet his obligations under immediate release procedures, steps will be taken in accordance with the regulations and existing policy directives to suspend those privileges.

f. *Open Cases.* Customs officers may apply these revised guidelines to all cases pending at any stage of the administrative process as of the date of this Manual Supplement. This applies to cases under supplemental as well as initial petition, and to cases for which notices have been issued but no response received. Payments made of Option 1 amounts determined under the 1981 guidelines shall be accepted. It is generally the violator's responsibility to petition for additional relief.

g. *Closed Cases.* Customs will not reopen closed cases solely to permit a petitioner to take advantage of these new guidelines. Supplemental petitions filed on cases previously settled under the 1981 guidelines will be disposed of under the 1981 guidelines if filed after April 1, 1983. This is based upon the presumption that the supplemental petition will have been filed solely to take advantage

of the benefits of these 1983 guidelines. A district or area director or regional commissioner, however, retains the discretion to mitigate further in response to a supplemental petition if he finds such action is warranted.

h. *Interest Chart.* A chart setting forth interest amounts to be charged in accordance with section 4.b.(1) of this directive has been prepared and is being distributed separately. The chart sets forth interest for duty amounts from $1 to $10,000 when the duty in that range is deposited between one and 30 days late. Late filing violations which fall outside this range will have to be individually calculated.

The chart sets forth duty amounts only in dollar increments. Accordingly, duty amounts will be rounded *down* in order to use the chart. For example, in order to determine the amount of interest for $1,758.94 deposited one day late, the user would look to $1,758 on the chart ($2). The actual calculation is $1,758 times .001 equals $2 ($1.75 rounded *up* to the next dollar).

For late filing violations that have to be individually calculated, the dollar amount shall be similarly rounded *down,* multiplied by .001 and the number of days late, and then rounded *up* to the next dollar. For example, $14,323.74 in duty filed four days late would be calculated as follows: $14,323 times .001 equals $14.32 times four equals $58 ($57.29 rounded up).

5. Superseded Material

Treasury Decision (T.D.) 80–298 is hereby revoked and superseded by this Treasury Decision. Manual Supplement 4400–01, dated November 18, 1980, is also superseded by Manual Supplement 4400–11, dated April 20, 1983.

Attachment.

File: CO:R:E:M, 614485 JP.

Dated: May 12, 1983.

Robert P. Schaffer,
Assistant Commissioner
(Commercial Operations).

1983 REVISION

DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE **NOTICE OF PENALTY OR LIQUIDATED DAMAGES INCURRED AND DEMAND FOR PAYMENT** 19 CFR 18.6, 172.31	Case Number Port Name and Code Investigation File No.
TO:	

DEMAND IS HERBY MADE FOR PAYMENT OF $ ______________, representing ☐ Penalties or ☐ Liquidated Damages assessed against you for violation of law or regulation, or breach of bond, as set forth below:

FAILURE TO FILE ENTRY SUMMARY TIMELY

The entry summary for entry number__________was due on ___________. It was filed and accepted on_________, or _________ days late. The amount of duty withheld was_____________. You must choose one of the following options in order to obtain mitigation of this demand:

1. You may pay _________ within 60 days of the date of this notice upon receipt of which the demand for liquidated damages will be cancelled. This payment is made in lieu of filing a petition and constitutes a waiver of right to file a petition.

2. You may petition for relief as specified below. If the entry summary was late by less than 30 days, you may expect further relief only if you can demonstrate that the violation alleged did not occur or was the result of Customs error.

LAW OR REGULATION VIOLATED		BOND BREACHED	
DESCRIPTION OF BOND (If any)	Form Number	Amount $	Date
Name and Address of Principal in Bond			
Name and Address of Surety on Bond			Surety Identification No.

If you feel there are extenuating circumstances, you have the right to object to the above action. Your petition should explain why you should not be penalized for the cited violation. Write the petition as a letter or in legal form; submit in (duplicate) (triplicate), addressed to the Commissioner of Customs, and forward to the District Director of Customs at

____

Unless the amount herein demanded is paid or a petition for relief is filed with the District Director of Customs within 60 days from the date hereof, further action will be taken in connection with your bond or the matter will be referred to the United States Attorney.

Signature By	Title	Date

Customs Form 5955A (060881)

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 4

Foreign Equipment Purchases by, and Repairs to, American Vessels

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to state explicitly that an appeal for the remission or refund of duties paid to Customs on the cost of repairs made to American vessels outside the United States, because of circumstances such as stress of weather or other casualty must be made within two years after liquidation of a vessel repair entry. This amendment is proposed to clarify existing regulatory provisions.

DATES: Comments must be received on or before July 19, 1983.

ADDRESS: Comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Jerry C. Laderberg, Carrier Rulings Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

The owners or masters of certain American vessels are required by section 466(a), Tariff Act of 1930, as amended (19 U.S.C. 1466(a)), to declare, enter, and pay a special 50 percent ad valorem duty on the cost of all repairs (including purchases of equipment, repair parts, or materials) made to the vessel outside the United States. If the owner or master disputes the decision of the appropriate Customs officer to classify an expenditure as dutiable, the owner or master may file a protest with Customs challenging the classification, rate, and amount of duties chargeable, in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514). Section

466(d), Tariff Act of 1930, as amended (19 U.S.C. 1466(d)), provides for remission or refund of the duty if (1) the repairs or purchases were necessary to repair damage caused by stress of weather or other casualty while the vessel was in the regular course of its voyage and to secure the safety and seaworthiness of the vessel to enable it to reach its port of destination, (2) the equipment, repair parts, or materials purchased were of American origin and installed by the vessel's crew or U.S. residents, or (3) the equipment, repair parts, or materials purchased, including the labor cost involved, were used as dunnage for cargo, or for the erection of temporary bulkheads or similar devices for the control of cargo.

The administrative procedure for remission or refund of duties when the master or vessel owner alleges that an expenditure covered by an entry is not subject to duty under section 466(a), or within the circumstances specified in section 466(d), is set forth in section 4.14, Customs Regulations (19 CFR 4.14).

The effect that liquidation of a vessel repair entry has on the right to appeal by the master or owner of a vessel depends on whether the appeal is based upon a question of classification (dutiability of the foreign expenditure) or remission or refund of duties due to certain circumstances. If the expenditure is alleged not to be dutiable under section 466(a), the owner of the vessel must file a protest in accord with section 514 within 90 days of liquidation of the entry to obtain further review of the claim. However, if the expenditure is alleged to warrant relief pursuant to section 466(d), because of circumstances such as stress of weather or other casualty, there is presently no specific time limit after liquidation of the entry within which a request for additional consideration of the claim must be filed. An appeal from that decision may be made at any time after liquidation of the entry. However, as noted below, Customs is proposing a requirement whereby an appellant would have two years from the date of liquidation of the vessel repair entry within which to present to Customs "good and sufficient evidence" of a claim for relief.

Prior to October 1980, the above dichotomy was stated in the last sentence of former section 4.14(e), Customs Regulations, as follows:

> Inasmuch as an unprotested liquidation insofar as it relates to the classification of items under section 466(a) of the Tariff Act of 1930, as amended, is final at the expiration of 90 days, a subsequent application in regard to such classification cannot be considered in the absence of a timely protest.

Treasury Decision 80-237, published in the Federal Register on September 30, 1980 (45 FR 64560), extensively amended the procedures set forth in section 4.14, Customs Regulations, for reporting and entry of foreign repairs to, and equipment purchases by, American vessels. Thus, current section 4.14 retains the distinction between processing claims made under 19 U.S.C. 1466(a) and/or 1466(d), but the distinction is no longer embodied in one paragraph.

The applicable language appears in the last two sentences of section 4.14(d)(1)(v) as

> * * * If the decision involves remission of duty under paragraph (c) of this section and the entry has been liquidated, reliquidation is not required. If any other relief is granted and the entry has been liquidated, reliquidation is required.

and in section 4.14(f) as

> Following liquidation of an entry, a protest under Part 174 of this chapter may be filed against the decision to treat an item or a repair as dutiable under paragraph (a) of this section.

It has come to Customs attention that the amendment to section 4.14 made by T.D. 80-237 may have unintentionally obscured the above-described dichotomy between the right to appeal in cases involving classification and remission issues. In addition, the present lack of a specific time limit within which an appellant must submit "good and sufficient evidence" to Customs in support of a claim for relief due to a casualty, has caused administrative difficulties in processing such claims under the law and regulations. Accordingly, Customs proposes to amend section 4.14(f) to make it clear to the public that an appeal for remission or refund of duties pursuant to 19 U.S.C. 1466(d) because of circumstances such as stress of weather or other casualty must be made within two years after the date of liquidation of the vessel repair entry.

Authority

The authority for the proposed amendment is R.S. 251, as amended, secs. 466, 498, 514, 624, 46 Stat. 719, as amended, 728, as amended, 734, as amended, 759 (19 U.S.C. 66, 1466, 1498, 1514, 1624).

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), from 9:00 a.m. to 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

E.O. 12291 and Regulatory Flexibility Act

It has been determined that the amendment is not a "major rule" within the criteria provided in section 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the regulations set forth in this document, if promulgated, will not have a significant economic impact on a substantial

number of small entities. Accordingly, these regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Todd J. Schneider, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Lists of Subjects in 19 CFR Part 4

Customs duties and inspection, imports, vessels.

Proposed Amendment to the Regulations

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

It is proposed to amend section 4.14(f), Customs Regulations (19 CFR 4.14(f)), to read as follows:

4.14 Foreign equipment purchases by, and repairs to, American vessels.

* * * * * * *

(f) *Protests.* Following liquidation of an entry, a protest under Part 174 of this chapter may be filed against the decision to treat an item or a repair as dutiable under paragraph (a) of this section. An application for relief filed under paragraph (d) of this section will be accepted notwithstanding that more than 90 days may have passed since liquidation of the entry, as Part 174 of this chapter is not applicable to the relief provided at 19 U.S.C. 1466(d). An application for relief must be filed with the appropriate Customs officer within two years of the date of liquidation of the vessel repair entry.

William von Raab,
Commissioner of Customs.

Approved: May 4, 1983.

David Q. Bates,
Acting Secretary of the Treasury.

[Published in the Federal Register, May 20, 1983 (48 FR 22746)]

U.S. Customs Service

General Notices

19 CFR Part 133

Application for Recordation of Trade Name: "PLAYERS & SPECTATORS A DRINKING AND GAMING ESTABLISHMENT"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "PLAYERS & SPECTATORS A DRINKING AND GAMING ESTABLISHMENT," used by Players & Spectators, Inc., a corporation organized under the laws of the State of Washington, located at East 27 Augusta, Spokane, Washington 99207.

The application states that the trade name is used in connection with a combined restaurant, tavern and amusement game services and franchise business.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before July 18, 1983.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue NW., Room 2417, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-5765).

Dated: May 12, 1983.

DONALD W. LEWIS,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, May 17, 1983 (48 FR 22252)]

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19 CFR Part 177

Proposed Change of Position in Tariff Classification of Bulk Liquid Chocolate; Extension of Time for Comments

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of extension of time for comments.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments with respect to a notice of a proposed change of position in the tariff classification of bulk liquid chocolate imported into the United States for further manufacturing. A document inviting the public to comment on this proposed change of position was published in the Federal Register on March 22, 1983 (47 FR 11956). Comments were to have been received on or before May 23, 1983. A request has been received to extend the period of time for the submission of comments. Customs believes that an extension of the comment period is warranted. Accordingly, this notice extends the period of time for comment until June 22, 1983.

DATE: Comments must be received on or before June 22, 1983.

FOR FURTHER INFORMATION CONTACT: Lee C. Seligman, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8181).

Dated: May 16, 1983.

JOHN P. SIMPSON,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, May 20, 1983 (48 FR 22747)]

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the U.S. Customs Service is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Customs Service Decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the U.S. Customs Service. Individuals to whom any of these decisions would be of interest should read the limitations expressed in 19 CFR 177.9(c).

A copy of any decision included in this listing, identified by its date and file number, may be obtained through use of the microfiche facilities in Customs reading rooms or if not available through those reading rooms, then it may be obtained upon written request to the Office of Regulations and Rulings, Attention: Legal Retrieval and Dissemination Branch, Room 2404, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. Copies obtained from the Legal Retrieval and Dissemination Branch will be made available at a cost to the requester of $0.15 per page.

The microfiche referred to above contains rulings/decisions published or listed in the Customs Bulletin, many rulings predating the establishment of the microfiche system, and other rulings/decisions issued by the Office of Regulations and Rulings. This microfiche is available at a cost of $0.15 per sheet of fiche. In addition, a keyword index fiche is available at the same cost ($0.15) per sheet of fiche.

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Dated: May 17, 1983.

B. James Fritz,
Director,
Regulations Control and Disclosure Law Division.

405-947 0 - 83 - 6

Date	Number	Issue
04-19-83	072133	Classification: Medi-studs or temporary training studs used to pierce earlobes are classifiable under the provision for jewelry and objects of personal adornment in item 740.38, TSUS.
05-03-83	106080	Vessels: A foreign-built derrick barge may be used to lift materials onto a vessel being built in a United States shipyard but its use in transporting equipment within the shipyard and its vicinity violates 46 U.S.C. 883.
04-27-83	106135	Vessels: A Bermudan-flag barge may transport a crane used in a stevedoring operation without violating 46 U.S.C. 883 (sec. 4.93, Customs Regulations).
05-02-83	106144	Vessels: The spouse and children of the officer of a foreign-flag vessel may accompany the officer on a voyage between United States ports and not be in violation of the coastwise laws (46 U.S.C. 65i, 65m, 289 and 883).
05-06-83	106155	Vessels: A foreign-flag "mother-vessel" carrying a submersible which will engage in underwater oceanographic research is not considered to be engaged in the coastwise trade provided no merchandise or passengers are transported between United States points (sec. 4.50(b), Customs Regulations).
04-07-83	543041	Value: United States value rejected owing to an imbalance between the losses incurred by the exporter and the high profits an importer realized on sales in the United States (IA 58/82 affirmed).
05-04-83	543061	Value: Transaction value permits allowance for defective merchandise provided the importer actually paid a lower priced invoice adjusted to reflect the defect.
05-06-83	543063	Value: The growing cost of waste bananas is not part of the value of processed banana products.

United States Court of Appeals for the Federal Circuit

(Appeal No. 82-15)

THE UNITED STATES, APPELLANT *v.* BORDER BROKERAGE CO., INC., APPELLEE

(Decided: May 11, 1983)

Before FRIEDMAN, BENNETT, and MILLER, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.* This is an appeal by the United States from a judgment of the United States Court of International Trade determining that certain imported wire rope fittings should have been admitted duty-free as "agricultural . . . implements" rather than subjected to duty as "articles of iron or steel." We affirm.

I

Wire rope fittings are used with wire rope as couplings between an object and the rope. The fittings here involved are used in the hauling of cut timber. The wire rope is wrapped around the log, and the fittings are used as couplings to secure the rope to the log. The other end of the rope is then attached to a power source (i.e., a tractor), which pulls the logs to their destination.

When the fittings were imported, the Customs Service classified them as "Articles of iron or steel . . ." under item 657.20 of the Tariff Schedules of the United States, 19 U.S.C. § 1202 (1976), and assessed a duty. The appellee protested this determination, and contended that the articles were entitled to duty-free entry as "agricultural and horticultural implements not specially provided for . . ." under item 666.00. The Service denied the protest.

The appellee filed suit in the Court of International Trade, challenging the characterization of the fittings as iron or steel articles. After a trial at which five witnesses testified and numerous exhibits were received, the court held that the fittings should have been classified as agricultural implements and admitted duty-free.

The court ruled that under *United States* v. *Norman G. Jensen, Inc.,* 550 F.2d 662 (CCPA 1977), "logging is an agricultural pursuit

and, therefore, the merchandise is agricultural implements." The court interpreted *Jensen* as holding that "the growing of trees and the harvesting of them is an agricultural pursuit. . . ." The court concluded that the record showed that the fittings were "chiefly used in agriculture" i.e., "logging applications," and that they therefore were properly classifiable as agricultural implements "under item 666.00 since it is obvious that they are 'implements.'"

II

A. The government correctly points out that the Court of International Trade was mistaken in its view that *Jensen* held that "the growing of trees and the harvesting of them is an agricultural pursuit." The holding in *Jensen* was much narrower.

The question in *Jensen* was whether a particular kind of tractor used to "skid" (i.e., drag) logs was within the Tariff Schedule item covering "tractors suitable for agricultural use." The court held that "the use of Tree Farm log skidders in skidding logs on farms, including tree farms, is part of the process of harvesting timber crops and that such use is 'agricultural' for purposes of [Tariff Schedule] item 692.30. . . ." 550 F.2d at 668. The classification in *Jensen* was based on actual use. The holding in *Jensen* was only that the use of that tractor for dragging logs "on farms, including tree farms" was an agricultural use of the tractors; the court did not make the broader holding that the Court of International Trade ascribed to it.

B. The fact that the Court of International Trade relied upon an impermissibly broad reading of *Jensen* does not necessarily mean that its decision was erroneous. To the contrary, we conclude that the rationale of *Jensen,* if not its actual holding, covers this case and requires affirmance of the Court of International Trade's ruling that these wire rope fittings are agricultural implements within the meaning of tariff item 666.00.

In holding that the use of the tractors "on farms, including tree farms," was "agricultural," the court in *Jensen* relied upon the "long-standing intent of Congress that 'agriculture' be most broadly defined and . . . the legislative history of current law showing that Congress has, since well before enactment of the [Tariff Schedules of the United States], regarded the harvesting of a timber crop on a farm to be like any other crop in a general farm program . . . ." 550 F.2d at 668.

The record here shows that "tree farms" are privately held timber lands that the state has certified as being in that category. The certification means only that the timber land is managed scientifically, with an emphasis on fire prevention and reforestation after the trees have been felled.

While federally owned forests cannot be "tree farms" because they are not state certified, the "tree farm" concept is nonetheless applicable to the timber operations on them. Two forestry experts

(one of whom participated in the creation of the "tree farm" concept and the development of federal laws pertaining to the management of national forests) testified that government-owned timber lands are managed in virtually the same way as tree farms. The government did nothing at trial, either by cross-examination or the introduction of contrary evidence, to impeach that evidence or cast any doubt on its correctness.

The appellee also introduced evidence, similarly unrebutted, that of the forest land in the United States, 19 percent is commercial land in the national forests that is "managed" "[e]xactly" "like tree farms," 32 percent is comprised "for the most part" of tree farms owned by the forest industry, and 40 percent is private farms and other land that includes tree farms and forest lands "managed" "[v]ery similar" to tree farms. Thus, although the record does not show the exact portion of the nation's forest lands that are either tree farms or are managed the same as tree farms, it does indicate that substantially more than half of forest lands fall into this category.

Since (1) the majority of the timber lands upon which these wire rope fittings are used are either tree farms or operated in the same way as tree farms, and (2) the existence *vel non* of a tree farm depends upon how it is operated, we conclude that under *Jensen* the use of these fittings is "agricultural." As *Jensen* recognized, Congress intended the term "agricultural" in the Tariff Schedules to have a broad meaning. It is consistent with this intention to treat as "tree farms" forest lands that are operated in the same way as tree farms, even though technically they are not tree farms. "[A]gricultural free list provisions . . . which were intended to benefit agriculture" are given "a very broad and liberal construction so that the evident purpose of Congress especially to favor agriculture might be carried out." *United States* v. *S.S. Perry,* 25 CCPA 282, 286 (CCPA 1938).

The government attempts to distinguish national forest land from tree farms on the ground that timber is removed from the former land for non-agricultural purposes (i.e., the creation of roads and recreational areas). The record refutes this argument. It indicates that roads are cut on both tree farms and national forests in order to gain access to areas where timber is to be cut and hauled away. These activities are directly related to harvesting timber because "[e]fficient harvesting of the timber by logging requires a carefully planned network of permanent forest highways together with many temporary woods roads or trails over which the logs are hauled out." 9 *Encyclopaedia Britannica* 619 (1973).

The record does not show that substantial timber cutting is done in national forests for recreational purposes or to clear land for power transmission lines. To the contrary, the record indicates that the bulk of timber cutting in national forests (as on tree farms) is

done as part of an organized harvesting to satisfy the public demand for timber products.

C. The Court of International Trade correctly held that the fittings are agricultural "implements" under tariff item 666.00. The Court of Customs and Patent Appeals has interpreted the term "implement" broadly. In *United States* v. *S.S. Perry, supra,* the court held that celluloid leg bands, used chiefly to identify chickens, were agricultural implements. *See also Wilbur-Ellis Co.* v. *United States,* 26 CCPA 403 (1939) (steel bale ties); *United States* v. *Border Brokerage, Inc.,* 343 F. Supp. 1396 (Cust. Ct. 1970), *aff'd,* 461 F.2d 1383 (CCPA 1972) (plastic planting bullets used for planting and growing trees are "agricultural or horticultural implements" under item 666.00). The wire rope fittings here involved are "agricultural implements" because their principal use is in connection with the agricultural activity of harvesting timber on land that is operated as a tree farm. *See* discussion *infra.*

III

The United States contends, however, that the articles here involved are part of a broad class of wire rope fittings used in various industries, and that since the chief use of this broad class of articles is not agricultural, they cannot be characterized as agricultural implements. It relies upon headnote 10(e)(i) of the Tariff Schedules, "General Headnotes and Rules of Interpretation," which provides that "a tariff classification controlled by use . . . is to be determined in accordance with the use in the United States . . . of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined."

The factors that are pertinent in determining a class of articles (*see United States* v. *Carborundum Co.,* 536 F.2d 373, 377 (CCPA 1976)) indicate that these wire rope fittings are a separate class, the chief use of which is agricultural. Although wire rope fittings are used in various industries (i.e., marine construction, oil rigging, mining, telecommunications, and logging), the record shows that the fittings used in logging have different physical characteristics from other fittings, and are tailored to meet the specific needs of the logging industry.

Witnesses with broad experience in the logging and the wire rope fitting industries testified that wire rope articles used in logging have distinctive characteristics. Because the fittings are used to haul heavy logs, they are constructed of a very high strength alloy and are generally stronger than fittings used in other industries. Unlike other fittings, logging fittings are also designed to be stronger than the rope with which they can be used, so that the rope will break prior to the point at which the fiting breaks. They have distinctive descriptions unique to the logging industry (i.e., bantam, light, standard, etc.), which indicate what size wire rope

can be used with the fitting. They are purchased and used for logging.

In contrast, the fittings used in other industries are made of cheaper materials, and normally are described on the basis of their "safe working load," that is, the tonnage they can safely carry overhead. Without such safety markings, logging fittings are not safe to use in those industries where the fittings are used to carry objects overhead. It is also not commercially practicable to use other fittings for logging.

In short, the evidence indicates that the logging fittings are not interchangeable with fittings used in other industries; their sole function is for hauling timber after it is cut. Accordingly, they constitute a separate class—wire rope fittings used chiefly for timber harvesting on tree farms and forest lands managed under similar scientific principles.

IV

Finally, the government argues that because item 666.00 covers only agricultural implements "not specially provided for" elsewhere in the Tariff Schedules, it is inapplicable to the fittings here involved because they come within the classification of "articles of iron or steel" under item 657.20. However, headnote 10(c) states that if an article is described in two or more classifications, it is "classifiable in the provision which most specifically describes it. . . ."

We have held that these wire fittings are agricultural implements. That is a more specific description than iron or steel articles. Item 666.00 "excepts only items *specially* provided for elsewhere, and item [657.20] is not sufficiently specific to 'specially provide' for the articles it contains." *United States* v. *Miracle Exclusives, Inc.*, 668 F.2d 498, 501 (CCPA 1981) (emphasis in original), and cases there cited.

The judgment of the Court of International Trade is affirmed.

Affirmed.

(Appeal No. 82-35)

THE UNITED STATES, APPELLANT *v.* LOCKHEED PETROLEUM SERVICES, LTD., APPELLEE

(Decided: May 11, 1983)

Before MARKEY, *Chief Judge*, FRIEDMAN, DAVIS, NICHOLS, and BENNETT, *Circuit Judges.*

DAVIS, *Circuit Judge.* The United States appeals from a final judgment of the Court of International Trade in which the trial judge held appellee Lockheed Petroleum Services, Ltd. (Lockheed) entitled to drawback of duties for a manifold centre that it caused

to be imported into the United States. This court has jurisdiction under § 127(a) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 38 (to be codified at 28 U.S.C. § 1295(a)(5)).

I

The facts can be quickly stated. Lockheed, a Canadian corporation, manufactured the manifold centre in Canada; this device was to be incorporated in this country into the M/C BASE (a vessel documented under the laws of Canada) by Delta Shipyards of Houma, Louisiana (Delta), which was building the vessel for Lockheed's account and ownership. In 1974, Lockheed imported the manifold centre into the United States and liquidated duties were paid in full.

Before the manifold centre was actually imported into this country, appellee requested a ruling from the United States Customs Service (Customs) as to whether it would be eligible for drawback pursuant to 19 U.S.C. § 1313 (a), (g) (1976),[1] subject to appellee's compliance with Customs regulations. Customs responded affirmatively, and provided Lockheed with a drawback rate.

In August 1975, Delta completed the M/C BASE for its use by Lockheed in oil exploration on the continental shelf in the Gulf of Mexico. On August 13, 1975, a Delta official mailed the abstract of manufacturing records required by 19 C.F.R. § 22.4(g) (1982)[2] to Lockheed's counsel in New York City for review and filing with Customs in New Orleans. On August 18, the M/C BASE departed from the port of New Orleans, before receipt there of the abstract and without examination by Customs, for installation on the outer continental shelf at Block 331 of the Eugene Island area, roughly 80 miles from New Orleans in the Gulf of Mexico. On the following day, the District Director of Customs in New Orleans received the abstract of manufacture from Lockheed's New York counsel.

Lockheed then filed a drawback entry with Customs. Customs denied drawback because, it said, the M/C BASE did not clear for a foreign port pursuant to 19 C.F.R. § 22.13(f) (1982) and also because Lockheed failed to comply with 19 C.F.R. § 22.4(g) (1982), *supra* note 2, requiring that an abstract of manufacture be filed before a vessel's departure from the United States. In April 1977, Customs adversely liquidated the drawback entry and later denied Lockheed's protests regarding the denial of drawback.

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[1] Under this statute (which has been specifically made applicable to materials imported and used in the construction of vessels built for foreign account and ownership) importers of merchandise used in the production and manufacture of articles in this country are generally entitled to a refund as drawback, less 1% of the customs duties paid, after the articles manufactured and produced in the United States have been exported.

[2] 19 C.F.R. § 22.4(g) (1982) provides that: (g) The builder of a vessel or aircraft upon which drawback is to be claimed under section 313(g), Tariff Act of 1930, shall keep the records provided for in this section so far as applicable. An abstract of such records shall be filed with the district director at the headquarters port of the district in which the vessel or aircraft is built in ample time prior to the first departure of the vessel or aircraft from the United States to enable that officer to have the abstract verified by examination of the vessel or aircraft and the builder's records pertaining thereto.

Lockheed instituted this action, to recoup the drawback, in the United States Court of International Trade. The trial judge held that Lockheed was entitled to recover. In his view, Lockheed "relied on the representations of Customs that drawback would be allowed," but was denied drawback merely because the abstract of manufacture arrived too late—less than 24 hours after the M/C BASE left port—due to the "unforeseen occurrence" of slow mail delivery. The judge concluded that, in these circumstances, equitable relief was appropriate because Lockheed was not to blame for the late arrival of the abstract.

II

We hold that the trial court erred when it held that the equities dictated an award of drawback duties to Lockheed. There was, in this case, neither compliance by appellee with the controlling requirements nor acceptable excuse for that failure. Drawback privileges under the Tariff Act of 1930 are expressly conditioned, by statute, upon "compliance with such rules and regulations as the Secretary of the Treasury shall prescribe. . . ." *See* 19 U.S.C. § 1313(j) (1976); *id.* § 1313(k) (Supp. IV 1980) (recodification). Numerous decisions have held that compliance with drawback regulations is mandatory. *See, e.g., United States* v. *W. C. Hardesty Co.,* 36 CCPA 47, 52 (1949); *American Tobacco Co.* v. *United States,* 61 Ct. Cl. 980, 991–92 (1926); *Nestle's Food Co.* v. *United States,* 16 Ct. Cust. App. 451, 457, T.D. 43199 (1929); *Spencer, Kellogg & Sons* v. *United States,* 13 Ct. Cust. App. 612, 615–16, T.D. 41459 (1926); *Lansing Co.* v. *United States,* 424 F. Supp. 112, 114, C.D. 4675 (Cust. Ct. 1976).

Lockheed failed to comply with an applicable regulation in its attempt to claim drawback. 19 C.F.R. § 22.4(g) (1982), *supra* note 2, expressly required Lockheed to file an abstract of manufacture with the district director of Customs at the port of New Orleans before the M/C BASE departed from the United States. It is undisputed that the M/C BASE left that port on August 18 and that Customs did not receive the abstract from Lockheed's counsel until August 19. Moreover, the trial court implicitly ruled that the M/C BASE did leave the United States when it was removed to the Eugene Island area at a point some 80 miles off the Louisiana coast, and Lockheed does not contest this finding on appeal.[3] We concur in the trial judge's *sub silentio* conclusion that the M/C BASE did leave the United States; that finding is not contrary to the weight of the evidence. *See Western Stamping Corp.* v. *United States,* 57 CCPA 6, 8, 417 F.2d 316, 317 (1969).

Because Lockheed failed to file the abstract prior to the departure of the M/C BASE, Customs had no opportunity to verify the

[3] The trial judge stated that there is no "opportunity for the vessel, the M/C BASE, to *again* leave the United States for the first time." *Lockheed Petroleum Services, Ltd.* v. *United States,* No. 77-9-03991, slip op. at 11 (Ct. Int'l Trade July 21, 1982) (emphasis added).

contents of the abstract through an examination of the vessel. As a result, Customs could not determine for itself whether Lockheed actually incorporated the manifold centre into the M/C BASE. Lockheed's current willingness to furnish a diving bell to Customs for inspection purposes at the Eugene Island site does not mitigate the failure to comply with the terms of 19 C.F.R. § 22.4(g) (1982). That regulation is mandatory, not merely directory, and compliance is a condition precedent to the right of recovery of drawback. *Cf. United States.* v. *W. C. Hardesty Co., supra,* 36 CCPA 47, 52 (1949).[4] Proffer of an after-the-fact substitute (cumbersome and bizarre in this instance) is not the equivalent of timely compliance.

III

The court below held that for two reasons Lockheed could recover drawback duties "under equitable principles". First, it found that Lockheed was not at fault for the asserted slow mail delivery of the abstract. Second, the court reviewed the previous communications between Lockheed and Customs which culminated in a Customs ruling that the manifold centre would be eligible for drawback. It concluded that Lockheed relied on Customs' representations that drawback would be allowed, and that Customs' subsequent denial of drawback was equivalent to forfeiture.

If there can be a case in which failure to comply with drawback requirements should properly be excused or overlooked, *cf.* 19 U.S.C. § 1520 (Supp. IV 1980), this is not one. The trial court abused its equitable powers in awarding drawback to Lockheed. Although since 1980 the Court of International Trade has possessed equitable powers akin to those of a district court (*see* 28 U.S.C. § 1585 (Supp. V 1981)), it surely cannot exercise those powers in favor of a party who, like Lockheed, is at fault for failure to comply with a mandatory regulation.[5] As we noted in Part II, *supra,* Lockheed had no legal entitlement to drawback unless it filed the abstract prior to the departure of the M/C BASE. It could have filed the abstract in a timely fashion in any number of ways to ensure compliance with the regulation, utilizing such well-known means as a telecopier, a messenger, or an overnight courier service. If it wished to use the U.S. Postal Service, it could have resorted to express mail, special delivery, or registered mail. It chose instead to rely solely on the ordinary post. The trial judge thought the failure of the ordinary mail to deliver the abstract in time was the fault of the Postal Service, but we consider that finding to be clearly erroneous. The

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[4] In *Hardesty, supra,* an importer sought drawback under the Tariff Act of 1930 for imported articles used in the manufacture of domestically-produced items which were, in turn, exported. The importer's broker mailed a notice of intent to export for benefit of drawback to the Collector of Customs at the port as prescribed by applicable regulations, but it arrived too late for the customs officials to inspect the merchandise before it was laden for export. *Hardesty, supra,* 36 CCPA at 49. The court found drawback to be properly denied because the notice of intent was not filed in a timely fashion, and because no inspection occurred; the court did not attribute fault to the post office for the late delivery of the notice, but rather to the importer and its broker. *Id.* at 52.

[5] We do not purport to pass upon the full extent of the court's equitable powers or whether the 1980 amendment gives the court any authority in addition to the power to grant new types of remedies (*e.g.,* injunctive, declaratory).

fault was plainly appellee's. Delta (Lockheed's agent) left only the short period of five days between its mailing to New York (August 13) and the departure of the M/C BASE from New Orleans on August 18—although the abstract had to go from Louisiana to New York and then back again to Louisiana. There is nothing in the record to show what constituted a reasonable or normal period of time for a piece of regular mail to move from Louisiana to New York and then back to New Orleans. Indeed, there is no proof to indicate when Lockheed's New York counsel actually mailed the abstract to Customs in New Orleans. And at the very least, appellee could have inquired from Customs in New Orleans, before permitting the vessel to leave that port, whether the abstract had been received. Lockheed has offered no explanation as to why it allowed the M/C BASE to leave before the abstract arrived in New Orleans, thus foreclosing the opportunity for Customs to examine the vessel before it departed.

In these circumstances, we cannot say that Lockheed was blameless for the late arrival of the abstract. *Cf. United States* v. *W.C. Hardesty Co., supra,* 36 CCPA 47, 49–52 (1949). Lockheed had several means at its disposal which it could have employed to guarantee compliance with the regulation, yet it neglected to use any of them. Equitable powers, even if available, should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable, due care and diligence. *See Grymes* v. *Sanders,* 93 U.S. 55, 61 (1876); *Anderson Brothers Corp.* v. *O'Meara,* 306 F.2d 672, 677 (5th Cir. 1962); *Williams* v. *IAM,* 484 F. Supp. 917, 920 (S.D. Fla. 1978); *aff'd,* 617 F.2d 441 (5th Cir.), *cert. denied,* 449 U.S. 840 (1980); *cf. Farnsworth* v. *Duffner,* 142 U.S. 43, 48 (1891).

We are also not persuaded that Lockheed can properly rest on the alleged earlier representations of Customs that drawback would be granted, or that the denial of drawback worked a forfeiture against Lockheed. Even if we assume *arguendo* that (1) the Customs officials had actually asserted that there would in fact be no inspection and that (2) they had the legal authority to waive inspection of the M/C BASE prior to the filing of the abstract—both doubtful points we need not now decide—Lockheed still could not recoup the drawback duties because it failed to follow the mandate of 19 C.F.R. § 22.4(g) (requiring an abstract to be sent) through its own affirmative negligence.[6] The judgment of the United States Court of International Trade is reversed.

Reversed.

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[6] In view of our disposition of the case, we do not reach the issue of whether Lockheed should be denied drawback because the M/C BASE did not clear for a foreign port in accordance with 19 C.F.R. § 22.13(f) (1982).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Frederick Landis
James L. Watson
Bernard Newman
Nils A. Boe
Gregory W. Carman

Senior Judges

Herbert N. Maletz

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 83-41)

DYNAMIC SUPPLY INC., PLAINTIFF-INTERVENOR [1] *v.* THE UNITED STATES, ET AL., DEFENDANTS, AND MANDEL & GRUNFELD, DEFENDANT-INTERVENOR

Court No. 83-3-00422

Before BOE, *Judge.*

[1] The within civil action was dismissed without prejudice as to the plaintiff, Fada Industries, Inc., by order of the court under date of May 4, 1983, pursuant to a stipulation made and entered into by all of the parties to said action under date of April 29, 1983.

Memorandum Opinion and Order

(Dated May 9, 1983)

Dewey, Ballantine, Bushby, Palmer & Wood (*Jonathan W. Miller* and *David B. Howorth*) for the plaintiff-intervenor.

David M. Cohen, Director, Commercial Litigation Branch (*David A. Lafer*) for the defendants.

Mandel & Grunfeld (*James A. Resti* and *Irving Mandel*) for the defendant-intervenor.

Boe, *Judge:* In 1981 the plaintiff-intervenor retained the law firm of Mandel & Grunfeld, defendant-intervenor, to file protests relating to the classification of certain solid-state digital watch modules. The plaintiff-intervenor agreed in writing at that time to pay contingent fees to the defendant-intervenor on any refunds which would be paid by Customs as a result of the filed protests. Pursuant to 19 C.F.R. § 174.13 the defendant-intervenor was designated as the mailing addressee of any refunds payable to the importer, the plaintiff-intervenor.

In accordance with the retainer agreement, the defendant-intervenor filed a series of protests with respect to the merchandise imported by plaintiff-intervenor. The final decisions of the United States Court of Customs and Patent Appeals in the cases of *United States* v. *Texas Instruments, Inc.*, 67 CCPA 57, C.A.D. 1243, 620 F.2d 272 (1980); 67 CCPA 59, C.A.D. 1244, 620 F.2d 269 (1980); 69 CCPA —, 673 F.2d 1375 (1982) have caused refunds to be due, owing and payable to plaintiff-intervenor by virtue of the protests filed in their behalf.

On September 14, 1982, the plaintiff-intervenor advised Customs that defendant-intervenor no longer represented it in connection with any matters pending before the customs service.

Upon dismissal of Mandel & Grunfeld as counsel by plaintiff-intervenor, the defendant-intervenor, claiming a lien on all refunds issued by Customs payable to plaintiff-intervenor, filed suit in the Supreme Court of the state of New York seeking the percentage share of the refund checks issued by Customs pursuant to the contingent fee agreement between the parties as well as the imposition of compensatory and punitive damages.

The defendant-intervenor instituted an action against Dennis T. Snyder, Regional Commissioner of Customs, Region II et al., Court No. 83-3-00356, and moved this court for the issuance of a temporary restraining order restraining the said defendants from issuing or offsetting the refund checks in question during the pendency of its application for a preliminary injunction.

A temporary restraining order was accordingly granted by this court on March 10, 1983, enjoining the release of the refunds in question by the defendants to the relevant importers pending a judicial determination of the rights of the present defendant-intervenor to an attorneys lien thereon.

Pursuant to a stipulation entered into between the present defendant-intervenor and the federal defendants above-referred to, the cause of action, Court No. 83-3-00356, was dismissed by order of this court under date of March 16, 1983.

Refund checks issued by Customs to the present date have been made payable to the plaintiff-intervenor and transmitted to the defendant/intervenor in care of that firm pursuant to the stipulation afore-referred to, the provisions of 19 C.F.R. §174.13 and the provisions of the contingent fee agreement between plantiff-intervenor and defendant-intervenor.

The plaintiff-intervenor instituted an action seeking the issuance of a temporary restraining order by this court restraining the defendants, the United States, et al., from releasing to the defendant-intervenor duty refunds on any entry in which the plaintiff-intervenor has been designated "importer or other protesting party" pending the ultimate disposition of the civil action. On March 24, 1983, this court, after a hearing on said motion, denied the motion for a temporary restraining order by the plaintiff-intervenor for the reasons set forth with particularity in the order of this court, Slip Op. 83-20.

In its reply in opposition to the plaintiff-intervenor's present pending motion for a preliminary injunction, the defendants, the United States, et al., have advised that Customs has changed its policy with respect to the revocation of the form designating the addressee to whom the refund checks were to be transmitted and, accordingly, will henceforth honor the importer's revocation of such a designation form. The refund checks, however, which were the subject of the stipulation entered into in Court No. 83-3-00356 will continue to be transmitted to the defendant-intervenor in accordance with the terms of said stipulation.

In the light of the foregoing information contained in defendants' memorandum, the plaintiff-intervenor, Dynamic Supply, Inc., strenuously urges that the present motion for a preliminary injunction should be granted.

This court, however, does not agree that any further facts have been established since the denial of the temporary restraining order herein requisite to the granting of a preliminary injunction. In the absence of fraud or mistake, the stipulation agreement entered into between the defendants and the defendant-intervenor relating to the transmittal of refund checks on protests filed in behalf of the present plantiff-intervenor and specifically enumerated in schedules 1 through 6, attached to the complaint in Court No. 83-3-00356, cannot be subject to collateral attack and, accordingly, shall be strictly enforced by this court. *Baltimore & Ohio Railway* v. *Voight,* 176 U.S. 498 (1900). This agreement was freely and voluntarily entered into between the parties. The plaintiff-intervenor knew of all of the proceedings that had previously transpired in this court with respect to the refund checks in question

but made no attempt to intervene in the proceedings instituted by the defendant-intervenor in Court No. 83-3-00356. Nor did the plaintiff-intervenor at that time assert any claim of interest relating to the subject of the action. The absence of the plaintiff-intervenor from the proceedings leading to the stipulated agreement is not fatal to that agreement since plaintiff-intervenor is fully able to protect its interests in the action presently pending in the state court of New York. Rule of Court 19(a); *Provident Tradesmen Bank & Trust* v. *Patterson,* 390 U.S. 102 (1968). This court cannot agree with the contention now urged that the plaintiff-intervenor should be deemed an indispensable party and, accordingly, should have been made, in turn, a party to the stipulation agreement and/or the action concerning which said stipulation agreement related.

Nor has there been a showing of the criteria requisite for the issuance of a preliminary injuction herein. *See S.J. Stile Associates* v. *Snyder,* 68 CCPA 27, C.A.D. 1261, 646 F.2d 522, 525 (1981). No showing has been made that the plaintiff-intervenor will be subject to immediate or irreparable damage in the event its present motion is not granted. The record herein reveals that the defendant-intervenor in open court has stated that the refund checks payable to the plaintiff-intervenor have been cashed and deposited in a special account. As this court has stated in its order denying the motion for a temporary restraining order, these funds are properly subject to the jurisdiction of the Supreme Court of the state of New York in which legal action is presently pending for the adjudication of the attorneys fees and other matters relating thereto.

The purpose of a preliminary injunction is to maintain the status quo in any proceeding pending its final adjudication upon the merits. *Lindahl King* v. *Saddleback Junior College District,* 425 F.2d 426, 427 (9th Cir.) (1970). The issuance of a preliminary injunction herein would, indeed, violate this very purpose.

The record in this proceeding is replete with matters which are not properly before this court in its present posture. Suffice it to say, this court refrains from expressing its veiws as to the ethical conduct evidenced by any party herein or as to the propriety of the employment contracts entered into between the plaintiff-intervenor and the defendant-intervenor for the specific services to be rendered.

Accordingly, it is hereby

ORDERED and ADJUDGED that the motion of Dynamic Supply, Inc., plaintiff-intervenor, for a preliminary injunction be and is hereby denied.

(Slip Op. 83-42)

A & A INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-1-00053

Before RE, *Chief Judge.*

Metal Detectors

Battery-operated metal detectors, classified under item 688.40 as electrical articles not specially provided for, were designed to emit an audible buzzing signal when in close proximity to metallic objects, specifically to detect the presence of ferrous metal underground. Plaintiff's claim for classification under item A685.70 as "other sound signalling apparatus" is sustained. Since the sole function of the importation was to call attention or signal the existence of metal underground, by a sound that was emitted only upon approaching the metal, the detector was a sound signalling apparatus under the provision for "bells, sirens, indicator panels, burglar and fire alarms, and *other sound or visual signalling apparatus*" under item A685.70 and thus entered duty free.

[Judgment for plaintiff.]

(Decided May 10, 1983)

Sharretts, Paley, Carter & Blauvelt (Peter Jay Baskin at the trial and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Robert H. White* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of merchandise invoiced as battery-operated metal detectors and exported from Hong Kong.

The metal detectors were classified under item 688.40, now item 688.43, of the Tariff Schedules of the United States (TSUS), as electrical articles not specially provided for. Consequently, they were assessed with duty at the rate of 5.5% ad valorem.

Plaintiff contends that the metal detectors are properly classifiable under item A685.70, TSUS, as other sound signalling apparatus. Therefore, plaintiff contends that they should enter duty free because they were imported from Hong Kong, a designated beneficiary developing country under the Generalized System of Preferences (GSP), General Headnote 3(c).

Alternatively, plaintiff claims that, if its primary claim is not sustained, the metal detectors are properly classifiable under item A712.49, TSUS, as other electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus, also eligible for duty-free entry pursuant to the GSP.

The pertinent statutory provisions of the tariff schedules are as follows:

	Classified by customs officials under:	
688.40	*Electrical articles,* and electrical parts of articles, *not specially provided for* [emphasis added]	5.5% ad val.
	Claimed by plaintiff under:	
A685.70	Bells, sirens, indicator panels, burglar and fire alarms, and *other sound* or visual *signalling apparatus, all the foregoing which are electrical,* and parts thereof [emphasis added]..............	Free.
	Alternatively claimed by plaintiff under:	
	Electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus, and parts thereof:	
	* * * * * * *	
A712.49	Other..	Free.

The question presented is whether the imported battery-operated metal detectors are electrical articles, as classified by Customs, or other sound signalling apparatus, as primarily claimed by plaintiff, or other electrical measuring, checking or analyzing apparatus, as claimed alternatively.

On the record before the court, and for the reasons that follow, it is the determination of the court that the imported metal detectors are properly classifiable as "other sound * * * signalling apparatus" under item A685.70, TSUS, and, therefore, are eligible for duty-free entry pursuant to the GSP.

It has been stipulated by the parties that the metal detectors are designed to emit an audible buzzing signal when their search coils come in proximity to a metallic object, and that their operation depends upon an electrical phenomenon which varies according to the factor to be ascertained. It has also been stipulated that if the metal detectors are properly classifiable under either item A685.70, TSUS, or item A712.49, TSUS, they are entitled to entry free of duty pursuant to the GSP.

One of plaintiff's three witnesses at the trial was Mr. Francis J. McClure, the comptroller of A & A International, Inc., who demonstrated the operation of the imported merchandise. He testified that he gained personal knowledge of metal detectors while manager of a Radio Shack retail outlet, a position he held prior to his employment with plaintiff. Radio Shack is a retail chain which sells plaintiff's products to the general public. Mr. McClure stated that he was familiar with the imported metal detectors, as he had

assembled, tested and operated them since Radio Shack first introduced them to the public.

As for the use of the metal detectors, Mr. McClure testified that a consumer would purchase them to detect the presence of ferrous metal located underground. He demonstrated the operation of the metal detector, explaining that it would first be adjusted to emit no signal when out of the presence of metal. Once properly adjusted, when in close proximity to metal, the detector would emit an audible "clicking-type" sound. As the detector came closer to the exact location of the metal, the clicking would become faster and louder, emitting the loudest sound when directly over the metal.

Out of Mr. McClure's vision, plaintiff's attorney placed several metallic objects beneath layers of styrofoam peanuts in a four-foot square box with six-inch sides. Mr. McClure adjusted the detector, and then passed the detector's search coil over the box. The detector began to sound, and Mr. McClure retrieved a tin can from the box. Mr. McClure then retrieved a watch, a 9-volt battery and another can. Utilizing the sound or tone created by the first tin can as the yardstick, Mr. McClure explained the differences in pitch created by the successive items. From the varying sounds emitted, he accurately predicted their size in comparison to that of the tin can.

Mr. McClure explained that the metal detector could differentiate between two metal objects of different sizes if the objects were located at the same depth. He noted that the pitch of the signal would vary with the distance from the metal to the detector's search coil, and with the size of the metal. He stated that an average consumer could make these distinctions once he or she had practiced using the item, and, hence, had trained the ear to distinguish the various sounds emitted.

At the request of defendant's attorney, Mr. McClure performed another demonstration. The metal detector emitted a noise when its coil was approximately two inches above a battery and a watch. At a height of four inches, however, the detector could only locate the battery. Mr. McClure explained that the mass and depth of an item were determinant in activating the detector. An additional demonstration showed that, by readjusting the detector, the search coil could locate smaller objects, specifically, a dime and a penny.

Defendant's witness, Mr. Robert Podhrasky, testified that he was employed as chief engineer of Garrett Electronics, a manufacturer of metal detecting equipment. Mr. Podhrasky, who has held the position of chief engineer for ten years, stated that his duties are to direct and participate in the design of metal locating equipment.

Mr. Podhrasky testified that metal detectors are used to locate the presence of metal. He stated that the metal detector in question could not tell the user what type of object is buried, nor could it identify the specific quantity of the object. He also testified that

the sole function of the detector is to emit an audible sound when it comes into close proximity with a metal object.

Mr. Podhrasky described, and performed a demonstration with a more expensive and more sophisticated metal detector manufactured by his company. Although it was clear that this more expensive metal detector could "screen out" certain objects and could be more "finely tuned" than plaintiff's imported detector, there was no doubt that the defendant's exhibit as well as the merchandise in issue were both metal detectors.

Examination of the representative sample of the imported merchandise, the testimony of all the witnesses, and the demonstrations conducted at trial, conclusively established that the importation is accurately described as a battery-operated metal detector. The testimony and demonstrations further established that the intensity and volume of the signal varied with the distance from the metal to the detector's search coil, and with the size of the metal. All the witnesses stated that the average consumer could train the ear to distinguish the various sounds emitted by the detector. With sufficient experience, the user could determine the size and depth of the buried metallic objects.

The testimony left no doubt that the metal detector is activated and signals only when metal is present. If the detector is moved away from the place where the metal is located, no sound is emitted. It is also clear that the detector's sole function is to emit a buzzing noise when in close proximity to a metallic object.

In challenging the Customs classification of the imported metal detector, plaintiff submits that the record conclusively establishes that it is a device which: (1) gives notice or information, (2) by means of an audible signal, (3) of a specific event which has taken place, that is, it has come into close proximity with a metallic object. Plaintiff contends that, since the detector's sole function is to emit an audible buzzing signal only when it approaches a metal object, it should be properly classifiable as sound signalling apparatus under item A685.70, TSUS.

Alternatively, plaintiff contends that the testimony demonstrates that the operation of the importation depends upon an electrical phenomenon which varies according to the factor to be ascertained and that the metal detectors permit the user to measure the quantity and distance of the metal from the user. Hence, plaintiff urges that if the imported metal detectors are not classified under item A685.70, TSUS, as sound signalling apparatus, they fall within the purview of other electrical checking and measuring devices, under item A712.49, TSUS.

Defendant maintains that plaintiff has failed to prove that the metal detectors fall within the class of merchandise classifiable under item A685.70, TSUS, or item A712.49, TSUS. Therefore, defendant asserts that plaintiff has not rebutted the presumption of

correctness which attaches to the Customs classification. 28 U.S.C. § 2639(a)(1).

Defendant states that "sound signalling apparatus" includes merchandise designed to give notice, warning or information, and communicate an emergency, special event, or temporary or abnormal condition. Defendant argues that the metal detector's sole purpose is to search and explore beach and picnic areas to locate buried metal objects, and does not give notice of any emergency or special event. It asserts that a metal detector is not *ejusdem generis* with the exemplars listed under item A685.70, TSUS, namely bells, sirens, indicator panels, burglar and fire alarms.

Defendant also contends that a metal detector is more than a mere signalling device, and, as such, is not properly classifiable under item A685.70, TSUS. According to the defendant, the metal detector's chief use is to detect and locate buried objects, and, therefore, has a function other than merely to signal. Hence, defendant contends that the metal detector is other than, or more than a signalling apparatus.

In response to plaintiff's claimed alternative classification, defendant argues that the importation, even though it depends on electrical phenomenon, does not measure or check within the meaning of item A712.49, TSUS. Defendant claims that it merely indicates the presence of metal, but cannot identify the object's size, weight, composition or distance. Consequently, defendant contends that the metal detector does not check or measure metal within the common definitions of those terms.

General Interpretative Rule 10(c) provides that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it * * *." To determine which category most specifically describes an imported article, General Interpretative Rule 10(d) requires that the court determine the article's chief use. For this purpose, the nature and design of the sample of the importation may often be of great probative value. *United States* v. *Halle Bros. Co.,* 20 CCPA 219, T.D. 45995 (1932).

As in all classification cases, the court must examine the imported merchandise and the record established by the parties in light of the competing tariff provisions.

This court, in prior cases, has considered the nature of the articles covered under item 685.70 by the provision, "other sound or visual signalling apparatus." In *Oxford International Corp.* v. *United States,* 75 Cust. Ct. 58, C.D. 4608 (1975), the importations were bicycle taillights which were classified under item 653.40 as illuminating articles. In upholding the classification and denying plaintiff's claim for classification under item 685.70 as "electrical visual signalling devices," the court stated that the provision, "other sound or visual signalling apparatus," must exclude articles

which operate *continuously* and which do not warn of the existence of emergencies *or special circumstances.* 75 Cust. Ct. at 68.

In this 1975 *Oxford* case, since it was evident that the lighting function of the taillights was necessary to their design and use, and that they functioned by casting a *steady* and *continuous* beam of light, the court held the importations were not "electrical visual signalling devices," but functioned primarily as illuminating articles. The court also indicated that "[t]he doctrine of *ejusdem generis* supports the interpretation that item 685.70 encompasses only those devices whose function is to call attention to *temporary* or *abnormal* conditions." *Id.* at 68 (emphasis added). The court added that "[a]ll of the named devices [bells, sirens, indicator panels, burglar and fire alarms] are activated or function in *temporary* or *abnormal* situations only," whereas the function of the taillights was to "light up the rear end of a bicycle to make it visible to oncoming cars." *Id.* at 68 (emphasis added). It concluded, therefore, that the taillights were properly classified as illuminating articles.

In an earlier case, chrome horn-lights, used solely on bicycle handlebars and classified as bicycle parts under item 732.36, were also claimed to fall under item 685.70, as "electrical sound or visual signalling apparatus." *Oxford International Corp.* v. *United States,* 70 Cust. Ct. 217, C.D. 4433 (1973). In this 1973 *Oxford* case, the court held that the horn portions of the merchandise were electrical sound signalling devices, but that the light portions served primarily to illuminate rather than to signal. It is well settled that a combination or multifunction article is not classifiable for tariff purposes under a specific provision describing only one of its functions. Thus, the court held that the imported merchandise was more than a "sound or visual signalling apparatus."

The court also noted that the light portion of the horn-lights, when turned on, emitted a steady, continuous beam, and that they were readily distinguishable from the 4-way flasher switches which formed a part of an emergency flasher system in *Fedtro, Inc.* v. *United States,* 59 CCPA 16, C.A.D. 1028, 449 F.2d 1395 (1971). The court examined several definitions of the word, "signal," and noted that the function of a signal was to convey information or give notice. It stated that "a horn is a device to give notice, warning or information by an audible sign, as an indication of an event or of danger." Although the horn portion of the imported merchandise was "a sound signalling device," the court, nevertheless, concluded that, because of the light portion, the imported horn-lights did not fall under item 685.70.

What was said of the horn portion in this *Oxford* case can be said of the metal detector in the present case since the evidence conclusively establishes that the detector gives an audible signal *only* when it detects the presence of metal. It therefore indicates to the user the existence of a *temporary condition,* i.e., the presence of metal. Although it may not warn of an emergency, the metal detec-

tor nevertheless *signals,* in that it gives notice or calls attention to a *special circumstance.* Hence, it is "a sound signalling apparatus" as described by this court.

The court does not agree with defendant's contention that the mere indication of the presence of metal is not the type of abnormal or temporary event which would bring the merchandise within the purview of sound signalling apparatus. The defendant would restrict the definition of "signal" to warnings of an emergency or "peculiar" situation. This court, however, in both *Oxford* cases did not give such a restrictive meaning to the word "signal." Rather, as indicated, a signal may simply convey information or notify of a specific event which will be readily understood by the user, and need not warn only of an emergency. As applied to the provision for "sound or visual *signalling* apparatus," the court has stated that all of the enumerated devices "are activated or function in temporary or abnormal situations only." 75 Cust. Ct. at 68. To interpret the statutory language as suggested by the defendant would also ignore the presence of the words "indicator panels" as one of the enumerated articles in item 685.70, as well as the holdings of *Fedtro* and other pertient cases. *See for example Intercontinental Air Freight, Inc.* v. *United States,* 62 Cust. Ct. 214, C.D. 3731 (1969) (court held that digital indicator panels were visual signalling apparatus in that they conveyed numerical information).

Defendant also argues that the metal detector is more than a signalling apparatus, and that judicial precedents preclude its classification as sound signalling apparatus. Defendant claims that the metal detector is designed to locate and identify the presence of metal, and to assist the user in retrieving metal objects. Hence, defendant reasons that the signal is merely incidental to or in furtherance of the primary use of the imported article, to wit, to locate metal objects.

Clearly, the sole function of the metal detector is to detect metal objects. The sound that it emits merely signals or notifies the user of the temporary event that metal has been detected. It is still solely a metal detector since the sound "did not give the article a use in addition to its intended use" as a metal detector. *See Oxford International Corp.* v. *United States,* 70 Cust. Ct. at 224, citing *Astra Trading Corp.* v. *United States,* 56 Cust. Ct. 555, C.D. 2703 (1966), which held that a screwdriver with an illuminating feature "was not more than a screwdriver since the illuminating feature did not give the article a use in addition to its intended use as a screwdriver."

On this subject, Judge Newman in *Ashflash Corp.* v. *United States,* 76 Cust. Ct. 112, 115–16, C.D. 4643, 412 F. Supp. 585 (1976), has stated that:

> It is well settled that where merchandise has a single primary function and an incidental, subordinate, or secondary

> function, it is classifiable on the basis of its primary design, construction, and function. * * * [Citations omitted.]
>
> Further, a long line of authorities holds that merchandise which constitutes more than a particular article or which has additional nonsubordinate or coequal functions is not classifiable as that article. * * * [Citations omitted.]

In *Ashflash,* the merchandise consisted of portable battery-operated "blinker" lanterns, which contained an illuminating searchlight as well as an automatic signal-warning red flasher for emergency use. Customs had classified the blinker lanterns as portable electric lamps under item 683.80, TSUS. Plaintiff claimed that the blinker lanterns were properly classifiable under item 688.40, TSUS, as electrical articles not specially provided for. The court found that the blinker lanterns' searchlight and warning flasher, "although utilizing a common power source, * * * have separate bulbs, sockets, lenses, wiring, contacts, and in most of the models separate switches * * *." *Id.* at 115. The court also found that the blinker lanterns had two coequal primary functions—the light which served to illuminate, and the flasher which served to signal. The searchlight could be used alone or in conjunction with the flasher. The flasher, as well as the light, could be used alone. Hence, since the blinker lantern was "more than" a portable electric lamp which only served to illuminate, it was not specifically classifiable under item 683.80, TSUS. Because of the two coequal separate functions, the blinker lantern in *Ashflash* was held to be dutiable as other electrical articles under item 688.40, TSUS.

Since the blinker lantern in *Ashflash* clearly had two distinct, coequal functions, to illuminate and to signal, with each function operating independently of the other, defendant's reliance on that case is misplaced. The metal detector at bar has been conclusively shown to possess but one function—to emit an audible signal only when in close proximity with metal objects. Clearly, the metal detector must first detect the existence of metal before signalling its presence. It will not emit a signal when metal is not present, but will only sound when the search coil nears a metal object.

In view of the foregoing, it is the determination of the court that the imported metal detector is properly classifiable under item A685.70, TSUS, as "other sound * * * signalling apparatus," and is entitled to enter duty free pursuant to the GSP. In view of this determination, it is unnecessary to consider plaintiff's alternative claim for classification under item A712.49, TSUS.

The claim is sustained, and judgment will issue accordingly.

(Slip Op. 83-43)

JULIAN R. WOODRUM, DENNIS DORSEY, AND SHERMAN JOHNSON, PLAINTIFFS *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 80-12-00105

Before RE, *Chief Judge.*

On Plaintiffs' Motion Pursuant to Rule 56.1 for Review of Administrative Determination Upon Agency Record

[Administrative determination of the Secretary of Labor denying certification of eligibility for worker adjustment assistance benefits affirmed.]

(Dated May 10, 1983)

Adler & Baker, for the plaintiffs, by *Robert S. Baker, Esq.,* of counsel.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Sheila N. Ziff,* for defendant.

RE, *Chief Judge:* In this action, plaintiffs, on behalf of the former employees of Capital Chrysler Plymouth of Montgomery, Inc., of Montgomery, West Virginia, challenge a determination by the Secretary of Labor denying them certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976). In substance, the Secretary found that plaintiffs were service workers employed by a firm that did not produce an article within the meaning of section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2722(3) (1976).

On July 26, 1982, this court, in *Woodrum* v. *Donovan,* 4 CIT —, Slip Op. 82-60 (July 26, 1982), *reh'g denied,* 4 CIT —, Slip Op. 82-78 (Sept. 17, 1982), remanded the case to the Secretary of Labor for further administrative proceedings. This court held that the Secretary's failure to comply with the procedural requirements of the statute had prejudiced plaintiffs' rights. Specifically, the Secretary was instructed to conduct a factual inquiry as to the ownership of Capital Chrysler Plymouth and the nature of the work performed by plaintiffs, and make a redetermination regarding plaintiffs' eligibility for benefits.

In compliance with the court's order, the Secretary conducted an investigation, and on November 10, 1982, submitted a redetermination and supplemental administrative record. The Secretary's investigation disclosed that plaintiffs were engaged in the preparation and servicing of new Chrysler automobiles prior to their retail sale by Capital Chrysler Plymouth. Moreover, it established that plaintiffs' employing firm was an independently owned and operated automobile dealership. The Secretary again denied plaintiffs' petition for certification of eligibility for benefits because, in the Secretary's view, plaintiffs were service workers employed by a firm that did not produce an article within the meaning of section 222(3). 47 Fed. Reg. 49116 (Oct. 29, 1982).

After reviewing the original and supplemental administrative records and the arguments and briefs of the parties, the court holds that the Secretary's denial of certification is supported by substantial evidence and in accordance with law.

The Secretary of Labor is required to certify a petitioning group of workers as eligible for trade adjustment assistance benefits if he determines:

> (1) That a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) That sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) That increases of imports of articles like or directly competitive with *articles produced* by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. [Emphasis added.]

Trade Act of 1974, § 222, 19 U.S.C. § 2272 (1976).

Plaintiff's petition was denied because it failed to satisfy the third eligibility criterion, *i.e.,* plaintiffs' employer, Capital Chrysler Plymouth, did not produce an article that had been adversely affected by increased imports.

In this action, plaintiffs' principal contention is that the Secretary of Labor misconstrued section 222(3) by interpreting narrowly the term "produced" to apply only to workers manufacturing the import-impacted articles. In particular, plaintiffs claim that, regardless of the nature of their work, the court should consider them as part of the production process for new Chrysler automobiles because their labor was essential to the final delivery of those automobiles to the general public. Plaintiffs further claim that they actually performed installation and assembly procedures which were a necessary part of the production process.

Plaintiffs also submit that the Secretary's interpretation of section 222(3), as a practical matter, has resulted in dissimilar treatment of similarly situated workers. Plaintiffs complain that the Secretary's determination invidiously discriminates, with respect to the receipt of trade adjustment assistance benefits, between employees of automobile dealerships controlled or substantially owned by automobile manufacturing companies, and employees of independently owned dealerships.

On remand, in support of their petition, the named plaintiffs offered affidavits describing the nature and extent of their duties at Capital Chrysler Plymouth. In their affidavits, plaintiffs Woodrum and Johnson stated that they were mechanics for the subject firm. As part of their work, they inspected and prepared new Chrysler cars prior to their retail sale. They made all final adjustments on the automobiles, "including setting the timing, front end align-

ments, checking the oil, inspecting the rods, tightening the wheels, and other tasks." If any mechanical defects existed in the automobiles, plaintiffs Woodrum and Johnson repaired them. On occasion, these repairs consisted of the replacement of defective engines, transmissions and differentials. Plaintiffs also were responsible for the installation of some dealer options, such as radios.

Plaintiff Dorsey's affidavit disclosed that he was a lot boy, who also inspected and prepared new Chrysler cars for Capital Chrysler Plymouth prior to their retail sale. He performed many of the same routine adjustments to the new cars as plaintiffs Woodrum and Johnson. Plaintiff Dorsey stated that employees of Capital Chrysler Plymouth installed various dealer options, such as radios, air conditioning, power steering and brakes, clocks, cruise control and racing stripes. However, nowhere in his affidavit did plaintiff Dorsey indicate that he installed any of these dealer options.

All three plaintiffs indicated that Chrysler Corporation paid Capital Chrysler Plymouth between $40 and $100 per automobile for the final inspection and "prep" work. Plaintiffs claimed that without the work they performed on new Chrysler cars prior to retail sale, those vehicles were unfinished and not suitable for sale as new cars. In essence, plaintiffs argue that their efforts constituted the final link in the production process. Hence, they submit they are entitled to be certified as eligible for worker adjustment assistance benefits. Plaintiffs maintain that their expansive reading of the term "produced" is consistent with the remedial purpose of the trade adjustment assistance program of the Trade Act of 1974.

In rendering a negative determination upon reconsideration of plaintiffs' petition, the Secretary found that the Chrysler Corporation produced finished articles, automobiles, ready for the retail trade and not semi-finished units requiring further substantial assembly. According to the Secretary, plaintiffs' work or activity at Capital Chrysler Plymouth consisted of adjustment and preparation of already finished automobiles and did not constitute production within the meaning of section 222(3) of the Act. Rather, plaintiffs serviced finished articles.

The Secretary also found that plaintiffs' employing firm was an independently owned and operated dealership and was not substantially owned or controlled by Chrysler Corporation, which produced the finished article. Therefore, Chrysler Corporation could not be regarded as the petitioning "workers' firm" within the context of section 222(3).

The court may review a decision by the Secretary of Labor denying a petition for certification of eligibility for trade adjustment assistance benefits to assure that the Secretary's determination has been made in accordance with law, and is supported by substantial evidence contained in the administrative record. 19 U.S.C. § 2395(b) (Supp. IV, 1980). The ownership of Capital Chrysler Plymouth and the kinds of work performed there are not in dispute. Therefore,

the question presented in this case is whether, in finding that plaintiffs were not eligible for benefits because their firm did not produce an import-impacted article, the Secretary of Labor correctly interpreted and applied section 222(3) of the Trade Act of 1974.

When construing a statute, the duty of the court "is to give effect to the intent of Congress." *Flora* v. *United States,* 357 U.S. 63, 65 (1958). The court must seek to discern the legislative will, first, by reference "to the literal meaning of the words employed." *Id. See also Fortin* v. *Marshall,* 608 F.2d 525, 527 (1st Cir. 1979). If a literal reading of the disputed provision does not answer the question presented, the court may look to the entire statutory scheme and to the provision's legislative history in an effort to resolve the ambiguity. *Massachusetts Financial Services, Inc.* v. *Securities Investor Protection Corp.,* 545 F.2d 754, 756–57 (1st Cir. 1976); *SCM Corp.* v. *United States,* 80 Cust. Ct. 226, 243, C.R.D. 78–2, 450 F. Supp. 1178, 1190 (1978).

It is also true that "[t]he interpretation put on the statute by the agency charged with administering it is entitled to deference." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31–32 (1981). *See also United Glass & Ceramic Workers of North America, AFL–CIO* v. *Marshall,* 584 F.2d 398, 407 (D.C. Cir. 1978). Courts, however, "must reject administrative constructions of the statute, whether reached by adjudication or rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Commission,* 454 U.S. at 32. "[I]t is for the courts, to which the task of statutory construction is ultimately entrusted, to determine whether or not administrative interpretations are consistent with the intent of Congress and the words of the Act." *United States* v. *New England Coal & Coke Co.,* 318 F.2d 138, 143 (1st Cir. 1963).

The Secretary maintains that the words "articles produced", under section 222(3), do not embrace the performance of services unrelated to the production of a tangible article. *Pemberton* v. *Marshall,* 639 F.2d 798 (D.C. Cir. 1981); *Fortin, supra.* The Secretary further contends that the trade adjustment assistance provisions of the Trade Act of 1974 require "the manufacture of an article the demand for which is decreased by the importation of a like article." *Pemberton,* 639 F.2d at 800.

In *Fortin,* former employees of an airline appealed the denial of their petition for certification of eligibility for trade adjustment assistance benefits. The court concluded that services were not "articles" as that term is used in section 222, and affirmed the Secretary's finding that, by performing a variety of passenger, cargo, mechanical, administrative and managerial tasks, the airline employees provided services rather than produced articles for consumers. Consequently, the airline employees could not be certified as eligible for trade adjustment assistance benefits.

In *Pemberton,* the petitioning workers performed repairs and maintenance on marine vessels at Bethlehem Steel Corporation's Baltimore Yards. The Secretary found that the Baltimore yards did not sell or otherwise place into the stream of commerce any "article" which had been impacted adversely by increased imports. The employees merely repaired and serviced articles which were already part of the stream of commerce. On the facts presented, the Secretary determined that the work of the Bethlehem employees was not provided in conjunction with the production of an article adversely affected by imports. In affirming the Secretary, the Court of Appeals for the District of Columbia Circuit stated:

> The repair and maintenance of a ship is clearly a service to an existing commodity. Even if the repair necessitates the use of new materials, it cannot be said to be the creation of a new ship any more than overhauling an automobile can be said to be manufacturing a car.
>
> *Fortin* * * * leaves no doubt that services do not fall within the terms of § 2272. * * * Appellants contend that *Fortin* * * * is distinguishable because in that case nothing tangible was produced. In our situation, the service did involve a tangible item—a ship—but the *same* item was also the end product. There was no transformation, but a mere refurbishing of what already existed. [Emphasis in original.] [Footnote omitted.]

Pemberton, 639 F.2d at 800.

Plaintiffs contend that neither *Fortin* nor *Pemberton* controls because, unlike the case at bar, the workers in those cases were not part of the production process. Plaintiffs also submit that, to the extent that *Pemberton* requires the manufacture of an article, it is wrongly decided. In their view, the Trade Act of 1974 only requires that the subject firm be a part of the production process. Plaintiffs do not claim to have manufactured new Chrysler automobiles. Nevertheless, they maintain that the record reveals that they are part of the production process because their labor was essential to the delivery of the import-impacted article to the public, and thus into the stream of commerce.

In support of their interpretation of the term "produced", plaintiffs call the court's attention to the legislative history of the Trade Act of 1974. Specifically, reference is made to section 2 of the Trade Act of 1974, 19 U.S.C. § 2102 (1976), which provides, in pertinent part:

> The purposes of this Act are,
>
> * * * * * * *
>
> (4) To provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firms, workers, and communities to adjust to changes in international trade flows; * * *.

Moreover, plaintiffs stress that those portions of the Act providing for adjustment assistance for workers created a new program to provide assistance for all workers injured by increased imports of articles. They point to the House and Senate reports accompanying the 1974 Act. The House Ways and Means Committee stated:

> The provisions of your committee's bill relating to adjustment assistance for workers differ to such an extent from those of the Trade Expansion Act which they would replace that they can reasonably be viewed as establishing a new program in place of the present one. In the opinion of the committee, the present program has proved to be inadequate and disappointing.

H.R. Rep. No. 571, 93rd Cong., 1st Sess. 52 (1973). At another point, the Committee report states that:

> The bill liberalizes existing criteria for determinations respecting the eligibility of industries for import relief, and firms or workers for adjustment assistance * * *.
>
> For firms and workers, an affirmative determination of eligibility to apply for adjustment assistance may be made if it is found that increased imports have contributed importantly * * * to a decline in sales or production and to the total or partial separation of a significant proportion of the workers in question.

Id. at 8.

In its statement of purposes, the Senate Finance Committee found that Congress needed:

> * * * * * * *
>
> (10) To provide greater access and more effective delivery of import relief to industries, firms and workers which are seriously injured or threatened with serious injury by increased imports;
>
> (11) To establish a program of adjustment assistance for communities adversely affected by imports, to expand investment and employment opportunities in such communities, and to improve existing adjustment assistance programs for workers and firms.

S. Rep. 1298, 93rd Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7187. Finally, in discussing the principal features of the trade adjustment assistance program, the Finance Committee stated:

> Under the worker adjustment assistance provisions approved by the Committee, workers in a firm would qualify for trade adjustment benefits if the Secretary of Labor, within sixty days after the filing of a petition, finds that an absolute increase in imports *contributed importantly* to the workers' unemployment, and to a decrease in sales or production of the firm from which they have become unemployed. [Emphasis in original.]

Id. at 7205.

Plaintiffs maintain that these legislative pronouncements evince a Congressional intent to provide broad protection and assistance to all workers who become unemployed as a result of increased imports. Plaintiffs submit that the Secretary's interpretation would limit the scope of coverage of the program only to those who manufacture goods. The Secretary's interpretation, plaintiffs contend, is at variance with the remedial nature of the trade adjustment assistance program. Plaintiffs urge the court to adopt a more expansive interpretation of the statute so as to effectuate the legislative intent. *Pemberton,* 639 F.2d at 800; *Fortin,* 608 F. 2d at 525.

Finally, citing section 3(j) of the Fair Labor Standards Act of 1938, 29 U.S.C. §203(j) (1976), section 3 of the War Labor Disputes Act, 50 U.S.C. Appendix §1503 (expired on December 31, 1946, 6 months after cessation of hostilities), and the *proviso* to section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4) (1976), plaintiffs argue that a retail distributor, like Capital Chrysler Plymouth, is engaged in production and, thus, is part of the production process. In construing the term "production" in the context of section 3 of the War Labor Disputes Act,[1] the Court of Appeals for the Seventh Circuit held a retail distributor to be engaged in production. *United States* v. *Montgomery Ward & Co.,* 150 F.2d 369 (7th Cir. 1945). More recently, the Supreme Court considered the meaning of the word "produced" in the case of *N.L.R.B.* v. *Servette, Inc.,* 377 U.S. 46, 54–57 (1964). In the course of its examination of the term "produced" in the *proviso* to 29 U.S.C. §158(b)(4),[2] the court found a wholesaler, although not directly involved in the physical process of creating or manufacturing products, to be in fact a producer of those products. Justice Brennen, speaking on behalf of the Court, stated:

> The term "produced" in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as "produced, manufactured, mined, handled, or in any other manner worked on * * *," 29 U.S.C. § 203(j), and has always been held to apply to the wholesale distribution of goods. The term "production" in the War Labor Disputes Act has been similarly applied to a general retail department and mail-order business. [Footnote omitted.]

Servette, 377 U.S. at 55–56. Plaintiffs maintain that their interpretation of "produced", as used in section 222(3) of the Trade Act of 1974, is entirely consistent with that accorded the term in other federal statutes in the areas of labor and commerce.

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[1] Section 3, in pertinent part, provided for the seizure of "any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith."

[2] 29 U.S.C. §158(b)(4).

* * * * * * *

> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *.

A careful reading of *Fortin, supra,* discloses that it has limited application to the present action inasmuch as it focuses on the distinction between articles and services as contemplated by the Trade Act of 1974. Nowhere in *Fortin* does the court discuss what constitutes the *production* process, *i.e.,* the various levels in the chain of production.

Pemberton, however, is most instructive on this question. It is clear that production under section 222(3) requires the manufacture or creation of something tangible. The *Pemberton* test is whether the workers in question transformed articles into new and different articles.

It is difficult to quarrel with the reasoning of *Pemberton* for it cannot be questioned that to "produce" means to give birth, create or bring into existence.

There is no doubt that plaintiffs' work was performed on tangible articles, Chrysler cars. By their own admission, however, plaintiffs did not manufacture new articles. Rather, their work consisted of adjustments and preparation of the tangible article which was also the end product. As in *Pemberton,* plaintiffs Woodrum, Johnson and Dorsey merely made repairs and serviced already completed articles. There is no evidence which indicates that plaintiffs made substantial changes to the new Chrysler cars resulting in their transformation into a new end product. For this reason, the Secretary concluded that plaintiffs' work constituted services, thereby rendering them ineligible for trade adjustment benefits.

It is true, as claimed by plaintiffs, that the remedial nature of the statute requires a liberal construction. *United Shoeworkers of Amer.* v. *Bedell,* 506 F.2d 174, 187 (D.C. Cir. 1974). Yet, the legislative history cited by plaintiffs does not lead this court to the conclusion that the Secretary of Labor erred in his interpretation of the statute. The House and Senate reports show that Congress intended to liberalize the criteria for certification in that the *causal link* requirement was replaced by one mandating a lesser showing, *i.e.,* that increased imports "contributed importantly" to the petitioning workers' separation from employment. *See* H.R. Rep. No. 93-571, at 52-54; S. Rep. No. 93-1298, at 133. The legislative history shows clearly that Congress did not intend to expand the scope of coverage in the manner contemplated by plaintiffs. As the court noted in *Pemberton,* "semantics do not overcome the reality that nothing new is entered into the stream of commerce." 639 F.2d at 800. Plaintiff's broad interpretation would extend the trade adjustment assistance program beyond the limits prescribed by Congress.

Plaintiffs attempt to expand the definition of "produced" to include automobile dealerships by analogizing to other federal labor statutes. The Trade Act of 1974, particularly the trade adjustment assistance provisions, are vastly different in purposes and goals from the statutes relied on by plaintiffs. Consequently, the analogy is unhelpful and unavailing.

Finally, plaintiffs contend that the Fifth Amendment to the Constitution prohibits dissimilar treatment of similarly situated workers by the Secretary unless a rational basis exists for the discrimination. *See United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 532–533 n. 5 (1973); *Eisenstadt* v. *Baird,* 405 U.S. 438, 446–447 (1972); *Lindsey* v. *Normet,* 405 U.S. 56, 77 (1972).

Plaintiffs claim that in certifying eligibility for trade adjustment assistance benefits the Secretary has created two separate and distinct classes of automobile dealership employees. The first class includes those employees who work for dealerships controlled or substantially owned by an automobile manufacturer. The second includes those employees who work for dealerships which are independently owned and operated under a franchise agreement, such as Capital Chrysler Plymouth.

The Secretary's interpretation of section 222 has resulted in the certification of employees from the first class and denial of certification for the second class. The distinction is based on the fact that dealerships operated under a franchise agreement are not controlled or substantially owned by a firm which produces import-impacted articles.

Plaintiffs maintain that the distinction is not sustainable because the two types of dealerships are functionally identical. They stress that their employees perform the same work and fulfill the same role in the production process, *i.e.,* the final preparation of new cars prior to retail sale. The sole distinguishing feature is ownership of the dealership. Plaintiffs submit that a determination of eligibility on the basis of ownership bears no relation to the purposes and goals of the trade adjustment assistance program of the Trade Act of 1974.

Prior case law reveals that the Secretary has properly construed section 222(3) to exclude from its coverage workers for service firms not managed, owned or controlled by a manufacturing firm producing the import-impacted article. *Pemberton, supra.* On occasion, the Secretary has certified service workers, but only where he has determined that they were integrated into the production of articles adversely affected by increased imports. The predicate for the determination is a finding that the petitioning workers were employed by a "firm" which produced, or had an "appropriate subdivision" which produced, the import-impacted article. The Trade Act of 1974, § 222(3).

The term "firm" is defined in 29 C.F.R. § 90.2 (1982) as follows:

> * * * an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy, and receiver under decree of any court. A firm, together with any predecessor or successor-in-interest, or together with any affiliated firm controlled or substantially beneficially owned by substantially the same persons, may be considered a single firm.

On the basis of this definition, an independently owned and operated automobile dealership which is not "controlled or substantially beneficially owned" by a domestic car manufacturer is not a part of the manufacturing firm. Hence, it is excluded from consideration as part of a "workers" firm or an appropriate "subdivision thereof" within the meaning of section 222(3).

The record leaves no doubt that Capital Chrysler Plymouth, plaintiffs' employing firm, is an independent franchised automobile dealership. Thus, the Secretary properly concluded that plaintiffs failed to satisfy one of the criteria necessary for an affirmative determination on certification.

Plaintiffs correctly state that the differentiation between the two classes of dealership employees can only be sustained if it is rationally or reasonably related to a legitimate governmental interest. *Moreno, supra; Eisenstadt, supra.* This differentiation in treatment, assuming plaintiffs satisfied all other eligibility requirements, does not result from an arbitrary, capricious or improper distinction by the Secretary between the two classes. Rather, it follows from a proper construction of the pertinent statute and a consistent application of a validly promulgated regulation, 29 C.F.R. § 90.2. Section 248 of the Trade Act of 1974, 19 U.S.C. § 2320 (1976), authorizes the Secretary of Labor to prescribe regulations for the implementation of the trade adjustment assistance program. In the court's view, the cited regulation comports with the intent of Congress as expressed in the statute to provide trade adjustment assistance only to workers of a firm which produces an import-impacted article.

There is no question that the legislative enactment is remedial in nature. Nevertheless, Congress intentionally set a limit on the extent of its remedial legislation affecting the adjustment assistance program. If anomalies or inequities exist in the law, permitting the certification of service workers in integrated manfacturing companies, but precluding certification of similarly situated workers in independent companies, they result from the express language of the statute. In the light of a carefully worded statute whose meaning is clear, the solution is not to be found in strained interpretation or judicial legislation.

In short, the distinction in the classification of workers who are eligible for trade adjustment assistance benefits is made in the statute itself, and no fault can be found with 29 C.F.R. § 90.2 or the Secretary's application of that regulation.

An attack upon the statute on constitutional grounds must also fail. The courts have consistently deferred to legislative determinations as to the desirability of statutory classifications in the regulation of economic activity and distribution of social welfare benefits. *Idaho Department of Employment* v. *Smith,* 434 U.S. 100 (1977). Clearly it is for the Congress, in the exercise of its judgment and discretion, to allocate funds in a way which will best promote and improve the general welfare. The courts may only intervene when

the Congressional "choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976), quoting *Helvering* v. *Davis,* 301 U.S. 619, 640 (1937). Even though a classification may lack mathematical precision, or may in practice result in some inequality, the court will sustain it, so long as the classification has a rational basis. *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 79 (1911).

The distinction in classes established by the statute and implemented by the Secretary's administration of the trade adjustment assistance program meets the "rational basis" standard applied in *Dandridge* and similar cases. Here, a "rational basis" is that it was reasonable for Congress to provide benefits to those workers whom it considered most immediately and directly affected by imports of like or directly competitive articles, namely, the employees of the firm producing the import-impacted articles.

The court, of course, is sympathetic to the plight of plaintiffs. However, it must be faithful to the legislative will and is "bound by what Congress has enacted." *Machine Printers & Engravers Ass'n* v. *Marshall,* 595 F. 2d 860, 862 (D.C. Cir. 1979). Furthermore, this interpretation of the statute, although not "authoritatively controlled" by judicial precedent, arises inevitably from the language of the statute as well as from the cases that have interpreted it. An amendment of the statute to correct a perceived shortcoming or inequity to include plaintiffs within its scope of coverage is not within the province of this court. As noted in *Bedell*:

> Congress has made a policy decision and drawn a line; our duty is to give the language of the statute a meaning that will carry out that policy. The result may appear harsh in this day of high unemployment and rising cost of living, but the remedy for congressional policies that do not extend beyond lawful bonds is in the legislature.

506 F. 2d at 187.

It is the determination of the court that the Secretary of Labor's denial of certification is supported by substantial evidence and is in accordance with the trade adjustment assistance provisions of the Trade Act of 1974. The determination of the Secretary is affirmed.

(Slip Op. 83-44)

JAMES A. BARNHART, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-3-00328

Before RE, *Chief Judge.*

On Plaintiff's Motion for Three-Judge Panel

Three-Judge Panel—Discretion of Chief Judge.

The use of the term "shall" in 28 U.S.C. § 255(a) does not make the appointment of a three-judge panel mandatory in actions contesting the constitutionality of an Act of Congress. The decision to appoint a three-judge panel rests within the considered discretion of the chief judge. 28 U.S.C. § 255; Ct. Int'l Trade R. 77.

[Motion denied.]

(Dated May 10, 1983)

Leonard M. Fertman, a member of Leonard M. Fertman Professional Corporation and *Arthur E. Schwimmer* (*Arthur E. Schwimmer* on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Saul Davis* on the motion) for the defendant.

Re, *Chief Judge:* Pursuant to the provisions of 28 U.S.C. § 255 (1970) and Rule 77(d) (2) and (3), plaintiff moves for the assignment of this action to a three-judge panel. Under Rule 7(c), plaintiff also requests oral argument of its motion pursuant to Rule 56.1 for review of an administrative determination by the Secretary of the Treasury.

19 U.S.C. § 1641(b) provides that a customhouse broker's license may be suspended or revoked if the Secretary of the Treasury finds that the broker is guilty, *inter alia,* of "disreputable" conduct. Plaintiff claims that the use of the term "disreputable" as a standard for revocation of a customhouse broker's license is so vague as to be unconstitutional. Plaintiff also contends that the statutory language of 28 U.S.C. § 255 mandates that the chief judge appoint a three-judge panel when a party challenges the constitutionality of an Act of Congress.

Section 255(a) provides that:

> Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Court of International Trade *shall* designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) *raises an issue of the constitutionality of an Act of Congress,* a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws. [Emphasis added.]

Rule 77(d), which implements section 255, provides in pertinent part, that:

> (1) * * * All actions shall be assigned by the chief judge to a single judge, except as prescribed in paragraph (2) of this subdivision (d).
>
> (2) * * * An action *may* be assigned by the chief judge to a three-judge panel either upon motion, or upon his own initiative, when the chief judge finds that the action raises an issue of the constitutionality of an Act of Congress, a proclamation of the President, or an Executive Order; or has broad or significant implications in the administration or interpretation of the law. [Emphasis added.]

Prior decisions of this court have clearly established that the appointment of a three-judge panel lies in the discretion of the chief judge. Plaintiff's claim arises from what appears to be an inconsistency between section 255 and Rule 77(d). While section 255 states that the chief judge *"shall"* designate a three-judge panel when he finds that the action "(1) raises an issue of the constitutionality of an Act of Congress * * * or (2) has broad or significant implications in the administration or interpretation of the customs laws," Rule 77(d) states that in these specified instances "an action *may* be assigned by the chief judge to a three-judge panel."

The question presented, therefore, is whether the term "shall" in section 255 is intended to delegate a mandatory or discretionary power in the chief judge, and whether the rule of court properly reflects the intent of Congress that discretion lies with the chief judge. It is the determination of the court that the use of the word "may" in Rule 77(d) properly interprets the legislative intent of section 255(a).

Congress' use of the term "shall," in and of itself, does not necessarily require the conclusion that mandatory action is intended. Rather, "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Railroad Co.* v. *Hecht,* 95 U.S. 168, 170 (1877). As this court noted in *Joanna Western Mills Co.* v. *United States,* 64 Cust. Ct. 218, C.D. 3983, 311 F. Supp. 1328 (1970):

> The judicial determination, whether a statutory provision is directory or mandatory, involves a consideration of a variety of factors. * * * "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory * * *. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." *The Liverpool Borough Bank* v. *Turner,* 30 L.J.Ch. 379, 45 Eng. Repr. 715, 718 (Ch. 1860), *aff'd,* 1 J. & H. 159, 70 Eng. Repr. 703 (1860).

Id. at 227–28.

When Congress enacted the Customs Courts Act of 1970, its primary goal was to strengthen and modernize the procedures before the United States Customs Court, now the United States Court of International Trade. *SCM Corp.* v. *United States,* 79 Cust. Ct. 163, C.R.D. 77–6, 435 F. Supp. 1224 (1977). Toward this goal, Congress abolished the historical use of the three-judge panel in classification and reappraisement cases by enacting 28 U.S.C. § 254 (1970), which declares that the "judicial power of the Customs Court [USCIT] with respect to any action, suit or proceeding shall be exercised by a single judge * * *." *See also,* Ct. Int'l Trade R. 77(d)(1). Prior to this enactment, approximately 60% of the cases before this court were heard by three-judge panels. *See United Merchants, Inc.* v. *United States,* 67 Cust. Ct. 601, C.R.D. 71–2, 328 F. Supp. 1403

(1971). The legislative history of this enactment clearly demonstrates that Congress' objective was to conserve judicial resources and to reduce the procedural delays inherent in the use of the three-judge court. *See* H.R. Rep. No. 91-1067, 91st Cong., 2d Sess. (1970) and *SCM Corp., supra.*

Section 255, the statute at issue here, confers upon the chief judge the authority to designate a three-judge panel to hear a case in specified exceptional situations. Congress thus clearly intended the appointment of a three-judge bench to be an exception to the normal or usual trial by a single judge. The three-judge panel was to be utilized only where the chief judge found the issues to be of such a nature as to require broader judicial representation. H.R. Rep. No. 91-1067, 91st Cong., 2 Sess. (1970).

Furthermore, the language of section 255 is instructive. Congress permits the chief judge to appoint a three-judge panel "[u]pon application of any party to a civil action, or upon his own initiative * * * [*when*] *the chief judge finds*" that the statutory criteria have been met. [Emphasis added.] 28 U.S.C. § 255(a) (1970). Therefore, the decision of whether an action "raises an issue of the constitutionality of an Act of Congress * * * or has broad or significant implications in the administration or interpretation of the customs laws," rests within the considered judgment of the chief judge. The chief judge may designate the panel *sua sponte,* or on motion of any party. Even if the request is unopposed, the chief judge still must make an independent evaluation of the issues presented to determine the necessity or propriety of a three-judge panel. *United Merchants, Inc., supra.* If the word "shall" under section 255(a) were to mean that the chief judge must, in all cases, designate a three-judge panel in the situations described in subdivisions (1) and (2) of that section, it would, in effect, deprive him of the necessary discretion which Congress intended in order to give significance and vitality to the purpose of the Customs Courts Act of 1970.

Plaintiff, in its reply brief, suggests that defendant's " 'discretion' argument is pertinent only to subdivision 2." It is significant to note, however, that the word "shall" in section 255(a) applies not only to subdivision (1) cases but also to subdivision (2) cases. By a literal reading of the statute, the word "shall," however interpreted, must apply equally to both subdivisions (1) and (2) cases. Hence, if it is mandatory when a constitutional issue is raised, it must also be mandatory in cases involving "broad or significant implications in the administration or interpretation of the customs laws." Many cases before the court are in the nature of class actions and may be said to have "broad or significant implications in the administration or interpretation of the customs laws." All of these cases therefore would be tried by a three-judge panel. Such a result would clearly do violence to the purpose of the Customs Courts Act of 1970, which provided that cases before the court be heard by a

single judge and which was designed to do away with the three-judge panel requirement in all but exceptional cases.

To achieve the legislative purpose and policy of the Customs Courts Act of 1970, it is clear that the word "shall" must be interpreted to be *permissive,* and must be read together with the words, "which the chief judge finds * * *." Read together with the words, "which the chief judge finds," section 255(a) manifests the congressional intent to confer discretionary authority upon the chief judge to determine whether the particular civil action raises the kind of issue, be it the constitutionality of an Act of Congress, or having a broad or significant implication in the administration or interpretation of the customs laws, as to warrant a three-judge panel. It is evident, therefore, that the use of the discretionary "may" in Rule 77(d) correctly interprets and implements the legislative intent of section 255(a).

To hold that the chief judge must appoint a three-judge panel in every action in which a party alleges that the statutory criteria have been met would thwart the twin Congressional goals of judicial economy and broad representation in exceptional cases only. Plaintiff thus bears the burden of establishing the facts which would warrant a finding that the action presents a question of such an exceptional nature as to require the designation of a three-judge panel. *SCM Corp., supra.*

The sole basis of plaintiff's claim in the present case is that the use of the word "disreputable" is so vague as to be unconstitutional, and that the revocation of its license on this basis should be reversed. Plaintiff also contends that the issue goes to the fundamental authority of the Secretary of the Treasury to revoke customhouse brokers' licenses.

Defendant has opposed plaintiff's motion. Defendant claims that the types of cases contemplated by Congress in enacting section 255 are those which possess emergent, broad and immediate effect upon the class governed by the act. Defendant contends that, although 19 U.S.C. § 1641(b) affects the plaintiff, it has not demonstrated, nor does the issue possess, the broad and emergent effect contemplated by section 255.

The mere fact that the decision of a case will resolve an issue of first impression, or have significant precedential value, is not sufficient to require the appointment of a three-judge panel. *SCM Corp., supra.* Indeed, as this court noted in *SCM Corp.,* the United States Court of International Trade (then, the United States Customs Court) is charged with the duty of the interpretation and application of the customs laws and "cases of novel impression are almost commonplace." 79 Cust. Ct. at 166. *SCM Corp.* considered the important question of whether this court had subject-matter jurisdiction of an action brought by an American manufacturer challenging the propriety of a decision rendered by the International Trade Commission under the Antidumping Act of 1921, as amended. Al-

though defendant concurred in plaintiff's motion, the court found that plaintiff's bare assertion that the jurisdictional issue was of "great significance 'to the entire community of American manufacturers,'" would not warrant the impanelling of a three-judge court. *See also United States* v. *Accurate Mould Co.,* 3 CIT 155 (1982), wherein the court denied plaintiff's motion for a three-judge panel to consider whether the court, under the Customs Courts Act of 1980, had acquired jurisdiction over all civil penalty actions brought pursuant to section 592 of the Tariff Act of 1930.

The case of *Farr Man & Co.* v. *United States,* 1 CIT 104 (1980), illustrates an appropriate occasion for the designation of a three-judge panel. In *Farr Man,* plaintiff established that the constitutionality of Presidential Proclamation No. 4547 was at issue, and that the entire governmental policy regarding domestic farm crop price supports was in potential jeopardy. Thus, plaintiff presented a constitutional issue, resolution of which would have an exceptional and far-reaching impact on the customs laws and governmental policy. Finding that these issues attained the stature intended by Congress to warrant broad judicial participation, the court granted plaintiff's motion for a three-judge panel. In *SCM Corp.,* on the other hand, no specific constitutional issue was in controversy, and plaintiff failed to show that disposition of the controversy would have "broad or significant implications in the administration or interpretation of the customs laws" within the congressional intent of section 255.

In the present action, plaintiff has not demonstrated that its claim falls within the class of actions intended by Congress under section 255. Allegations of unconstitutionality, in and of themselves, are insufficient to bring an action within the confines of the section 255 exception to the single-judge trial standard. Indeed, in the past, cases raising questions of the constitutionality of an Act of Congress also have been resolved exclusively by a single judge of this court. *See, e.g., Erie Navigation Co.* v. *United States,* 83 Cust. Ct. 47, C.D. 4820, 475 F. Supp. 160 (1979) (holding statute assessing duties on costs of foreign repairs done to United States vessels to be constitutional).

Although it is possible to envision an action where a single constitutional issue would merit a three-judge panel, plaintiff has not established that this action meets the necessary criteria. Neither does this court find that the case presents an issue of exceptional or far-reaching impact within the meaning of the pertinent statute.

The plaintiff's motion for assignment of this case to a three-judge panel is denied. Plaintiff's request for oral argument of its motion under Rule 56.1 is therefore referred to the judge to whom this action has been assigned.

(Slip Op. 83-45)

PACIFIC TRAIL SPORTSWEAR, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-2-00167

Before RE, *Chief Judge.*

Ski jackets

Ski jackets, specially designed for use by children in skiing, were classified as other men's or boys' wearing apparel, of man-made fibers, not knit, and dutiable at the rate of 25 cents per pound plus 27.5 per centum ad valorem under item 380.84 of the tariff schedules. An examination of the sample and the overwhelming evidence at trial established that the jackets were water resistant and water repellent and were specially designed for skiing, which was a use similar to hunting or fishing. They were, therefore, properly classifiable under item 376.56 which provides for garments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated, with rubber or plastics. Hence, they were dutiable at the rate of 16.5 per centum ad valorem.

[Judgment for plaintiff.]

(Decided May 11, 1983)

Rode & Qualey (*Patrick D. Gill* at the trial; *Michael S. O'Rourke* with him on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Robert H. White* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of children's jackets imported from South Korea. The jackets were classified by the customs officials as "Other men's or boys' wearing apparel, not ornamented: Of man-made fibers: * * * Not knit," under item 380.84 of the Tariff Schedules of the United States. They were, therefore, assessed with duty at the rate of 25 cents per pound plus 27.5 per centum ad valorem.

Plaintiff protests that classification and contends that the importations are ski garments, and, therefore, are properly dutiable at only 16.5 per centum ad valorem under item 376.56 of the tariff schedules, as modified by T.D. 68-9, which provides for "Garments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated, with rubber or plastics." Plaintiff contends that since the jackets were specially designed for use by children in inclement weather, specifically for the sport of skiing, they are excluded from classification under item 380.84 of the tariff schedules.

The pertinent provisions of the tariff schedules are as follows:

Classified under:

Schedule 3, Part 6, Subpart F:

Other men's or boys' wearing apparel, not ornamented:

* * * * * * *

Of man-made fibers:

* * * * * * *

380.84 Not knit .... 25¢ per lb. +27.5% ad val.

Claimed under:

Schedule 3, Part 6, Subpart D:

Garments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated, with rubber or plastics, which (after applying headnote 5 of schedule 3) are regarded as textile materials:

* * * * * * *

376.56 Other .... 16.5% ad val. column

At the trial, plaintiff introduced extensive testimony to show that the jackets were designed for skiing, which is a use similar to the use of garments for rainwear, hunting, or fishing. Furthermore, plaintiff contends that the jackets' special features (i.e., zippered pockets, ski collar and waterproof material) clearly indicate that they were designed for skiing, and, consequently, fully satisfy the requirements for classification under item 376.56.

Defendant, on the other hand, asserts that the design features which allow the jackets to be used for skiing are common to many short length, cold weather jackets. It also submits that the quilting process to which the merchandise was subjected renders it less waterproof than it would have been otherwise, thus supporting the inference that these garments were not designed for use as rainwear or any other similar use.

In support of its position, plaintiff offered the testimony of its president, Mr. Larry C. Mounger, the first of five witnesses, that the merchandise in issue (a representative sample of which was introduced as plaintiff's exhibit 1) was coated with polyurethane to give the fabric a waterproof quality. Mr. Mounger testified that the merchandise was sold in ski stores and in ski departments of both sporting goods and department stores throughout the United States.

Plaintiff's second witness, Mr. Yosh Nakagawa, president of Osborn & Ulland, Inc., a large, nationwide retailer of sporting goods, corroborated Mr. Mounger's testimony, and added that, although the quilting process may detract, somewhat, from the "waterproofness" of the merchandise, it is necessary in order to allow the garment to "breathe" or ventilate. He stated that it is undesirable to make a garment 100% waterproof for such active wear uses because moisture will condense inside the garment creating chill factors and other conditions detrimental to health. In addition, Mr.

Nakagawa testified that the merchandise at issue was particularly well suited for skiing because it included design features such as a high rise zipper that goes up to the top of the collar line, a tab for ski lift tickets, zippered pockets, as well as the waterproof coating of the fabric.

Plaintiff's third witness was Ms. Marlene Atkinson, plaintiff's vice president in charge of design. Prior to assuming this position she was responsible for the design of the firm's "Ski Stuff" line which includes the importer merchandise. Ms. Atkinson testified that the purpose of the polyurethane coating on the fabric was to make the garment waterproof for outdoor wear by children, and that the jacket was designed to protect a child while skiing in snow and wet conditions. She stated that if water was dropped on the garment, it would "bead up," that is, not soak through, a fact which was stipulated by defendant. Ms. Atkinson, an expert on children's ski wear, also compared plaintiff's jackets to children's snowsuits stating that they have common features and are both manufactured from waterproof nylon. As to the quilting feature, she testified that this was intentionally introduced into the garment to make it attractive, and stressed that this is a common and predominant feature of ski wear.

Ms. Susan Diehm, plaintiff's fourth witness, was a member of the board of directors of the Baron Ski Shop, a specialty ski shop which has purchased and sold plaintiff's "Ski Stuff" line, and stated that it was her best selling line for children. She testified that, because of its features, the merchandise at issue was particularly well suited for skiing. On cross-examination she opined that a child might use the jacket to go to and from school as well as on the ski slope.

Plaintiff's final witness, Mr. Peter Heuwiler, was an Olympic skier and certified ski coach. He testified that he was intimately familiar with the types of ski wear and equipment necessary for skiing and that plaintiff's garment fully met all the requirements of a ski jacket, including that it be water repellent.

It is fundamental in customs classification cases that the Government's classification is presumed to be correct, and that the "burden of proving otherwise shall rest upon the party challenging such decision." 28 U.S.C. § 2639(a)(1). In order to prevail in this case, plaintiff must prove that (1) the jackets are "wholly or almost wholly of fabrics which are coated or filled * * * with rubber or plastics," and (2) that the jackets are "designed for rainwear, hunting, fishing, or similar uses."

To determine whether plaintiff's garments are "almost wholly of fabrics which are coated * * * with rubber or plastics" the court must examine General Headnote 9(f)(iii) which defines the phrase "almost wholly of" as follows:

> (iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding

the fact that significant quantities of some other material or materials may be present;

The meaning of this phrase was considered in *A. N. Deringer, Inc.* v. *United States,* 66 Cust. Ct. 378, C.D. 4218 (1971), where the merchandise consisted of children's snowsuits rather than ski jackets as in the instant case. In *A. N. Deringer,* the question presented was whether the neoprene nylon fabric, which supplied the waterproof character to the snowsuits, was an essential character as described in the general headnote definition. After examining the record, the court stated that:

> [T]he imported snowsuits offer not only warmth to the wearer, but also water resistance. The latter characteristic distinguishes them from other snowsuits and makes them what they are. Therefore, that quality furnishes the essential character to the articles. Since that element is supplied by the coated nylon neoprene fabric, these snowsuits are "almost wholly of" that fabric within the meaning of the tariff schedules.

Id. at 385.

Similarly, in the case at bar, it is clear from the examination of the sample (plaintiff's exhibit 1), and the testimony of plaintiff's witnesses, particularly that of Mr. Nakagawa and Ms. Atkinson, that it is the polyurethane coating to the fabric which makes it water resistant and water repellent giving it its essential character. *See H. Rosenthal Co.* v. *United States,* 81 Cust. Ct. 77, C.D. 4769, 460 F. Supp. 1246 (1978), *aff'd,* 67 CCPA 8, C.A.D. 1236, 609 F. 2d 999 (1979); *Kaplan Products & Textiles, Inc.* v. *United States,* 70 Cust. Ct. 166, C.D. 4425 (1973); *A. N. Deringer, supra.*

The next question is whether the jackets are "designed for rainwear, hunting, fishing, or similar uses." It is well established in classification cases that, in addition to testimonial evidence, whether an article is "specially designed" or "specially constructed" for a particular purpose may be determined by an examination of the article itself, its capabilities, as well as its actual use or uses. *United States* v. *Air-Sea Forwarders,* 54 CCPA 67, C.A.D. 907 (1967); *David E. Porter* v. *United States,* 76 Cust. Ct. 97, C.D. 4641, 409 F. Supp. 757 (1976); *Sports Industries, Inc.* v. *United States,* 65 Cust. Ct. 470, C.D. 4125 (1970). Close examination of the merchandise, together with the testimony of the witnesses, particularly that of Mr. Mounger and Ms. Atkinson, clearly shows that plaintiff designed the jacket to be marketed and used as a ski jacket.

The testimony on this point is overwhelming and unrefuted. Nevertheless, defendant argues that, despite the evidence presented at trial, plaintiff's garment is not covered under item 376.56 because it is not sufficiently *waterproof.* Whether a garment or fabric is waterproof is determined by subjecting it to what is termed a "cup test." This test has been described as follows:

> A 15 inch square of cloth is placed over a liter beaker, a pocket or cup is formed in the cloth, avoiding folds if possible, and the periphery of the cloth is fastened by such as rubber-bands to the outside of the beaker. Then 0.4 liter of water at room temperature is poured gently into the "cup." If after 24 hours no water appears in the beaker, the fabric is considered to be waterproof.

United States v. *D. H. Grant & Co.,* 47 CCPA 20, 23 n.5, C.A.D. 723 (1959).

This test has been approved in cases which dealt with the classification of yard goods as "waterproof cloth," and was intended to apply to cloths generally used in the manufacture of articles which are designed to offer protection against water. *Rohner, Gehrig & Co.* v. *United States,* 64 Cust. Ct. 532, C.D. 4030 (1970). An examination, however, of item 376.56 and its predecessor provisions [1] clearly shows that "waterproofness" of the garment, as opposed to the cloth from which the garment is made, is not, and has never been a requirement of that provision.

Defendant does not point to any cases which have interpreted that item as providing for such a requirement. What is required by item 376.56 is that the garment be "designed for rainwear, hunting, fishing, or similar uses." This requirement necessitates an analysis as to whether or not the coating on the fabric "visibly and significantly" affects the garment's surface rendering it water repellent rather than waterproof. *See H. Rosenthal* and *Kaplan Products, supra.* Thus, as aptly stated by the court in *A. N. Deringer*:

> *The provision is * * * not limited to garments which afford protection against rain but includes wearing apparel used in outdoor sports activities,* such as hunting or fishing, which may be carried on in inclement weather or in or upon water, and where protection from moisture and dampness is desirable. *In our view waterproof snowsuits which are used to protect the wearer from the effect of cold and snow while engaged in outdoor activities are related garments and fall within the language, garments designed for rainwear, hunting, fishing, or similar uses.*

---

[1] The predecessor provisions of item 376.56 (and item 376.54) TSUS, provided:

Rainwear of textile materials and rubber or plastics:

376.50	Garments with a textile-fabric base supporting a rubber or plastics coating or covering on the outer surface of the garment	12.5% ad val.
	Garments with a textile-fabric outer surface having a rubber or plastics coating or covering on the inner but not on the outer surface of such fabric:	
376.54	With textile fabric of cotton	15% ad val.
376.58	Other	30% ad val.

The purpose for which Congress amended these provisions in 1965 is set forth in H.R. Rep. No. 1728, 88th Cong., 2d Sess. (1964) at 12 as follows:

Subsection (d) would substitute new clarifying language for the rainwear provided for in items 376.50–376.58. This amendment is related to the proposed changes affecting articles which are wholly or in part of fabrics covered with nontransparent rubber or plastics. The amendment specifically mentions, in addition to rainwear, other related garments made wholly of such fabrics.

66 Cust. Ct. at 383 (emphasis added).

This court agrees with the analysis and interpretation of item 376.56 found in *A. N. Deringer,* a case similar to the one at bar. It has long been held that whether *stare decisis* should "be followed or departed from is a question entirely within the discretion of the court." *Hertz* v. *Woodman,* 218 U.S. 205, 212 (1910). Since the question presented and the merchandise at issue in *A. N. Deringer* are so substantially similar to those of the present case, this court has concluded that *stare decisis* applies, and should be followed here. As plaintiff notes, the court in *A. N. Deringer* stated that "a snowsuit has been defined as a child's lined outer garment for winter wear, similar to a *ski suit,* either in one piece or consisting of ankle length pants and a short, snug jacket." 66 Cust. Ct. at 384 (emphasis added). Indeed, in its brief, plaintiff properly observes that "if anything, the case for classification under item 376.56, TSUS, is even more compelling with a ski jacket than with a snowsuit."

Plaintiff's witnesses were thoroughly familiar with the design, sale and use of the garments at issue. Their testimony, which was candid, credible and reliable, established beyond question that the imported ski jackets were designed for use by children engaging in the sport of skiing, a "similar" use under item 376.56.

It is the determination of this court that plaintiff has borne its burden of proof, and that the presumption of correctness has been overcome. Since the imported children's ski jackets were designed for skiing, they are excluded from classification under item 380.84 of the tariff schedules. Hence, they are properly classifiable under item 376.56 as "Garments designed for rainwear, hunting, fishing, or similar uses."

Plaintiff's claim is sustained, and judgment will issue accordingly.

(Slip Op. 83-46)

BRITTANIA SPORTSWEAR (A DIVISION OF SCHOENFELD INDUSTRIES, INC.), PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 81-1-00109, etc.

Nonornamented Jeans

Jeans which have a single fabric loop on their sides, at the hip, are not "ornamented" within the meaning of the TSUS.

[Judgment for Plaintiff.]

(Decided May 11, 1983)

Rode and Qualey (*Michael S. O'Rourke* at the trial and on the brief) for the Plaintiff.

J. Paul McGrath, Assistant Attorney General, (*Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, and *Deborah E. Rand* at the trial and on the briefs) for the Defendant.

WATSON, *Judge:* This action places in issue the classification of imported merchandise consisting of several styles of jeans, which have a single fabric loop on their sides at the hip. The jeans were classified under items 380.00 [1] (men's) or 382.00 [2] (women's), Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, as men's or women's wearing apparel, ornamented, of cotton.

Plaintiff claims that the loops do not render the articles "ornamented" within the meaning of the TSUS and that the articles should therefore be classified as men's or women's wearing apparel, not ornamented, of cotton, under items 390.39 [3] (men's) or 382.33 [4] (women's) TSUS.

> Headnote 3 to Schedule 3 of the TSUS provides:
>
> 3. For the purposes of the tariff schedules—
>
> (a) the term *"ornamented,"* as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—
>
> (i) fibers, filaments (including tinsel wire and lame), yarns, or cordage, any of the foregoing introduced as needlework or otherwise, including—
>
> (A) embroidery, and pile or tufting, whether wholly cut, partly cut, or not cut, and
>
> (B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;
>
> (ii) burnt-out lace;
>
> (iii) lace, netting, braid, fringe, edging, tucking, or trimming, or textile fabric;
>
> (iv) applique and replique work, beads, bugles, spangles, bullions, or ornaments; or
>
> (v) any combination of the foregoing types of methods of ornamentation;

---

[1] Men's or boys' lace or net wearing apparel, whether or not ornamented, and other men's or boys' wearing apparel, ornamented:
Item 380.00 Of cotton .... 35% ad val.

[2] Women's, girls', or infants' lace or net wearing apparel, whether or not ornamented, and other women's, girls', or infants' wearing apparel, ornamented:
Item 382.00 Of cotton .... 35% ad val.

[3] Other men's or boys' wearing apparel, not ornamented:
Of cotton:
Not knit
Item 380.39 Other .... 16.5% ad val.

[4] Other women's, girls, or infants' wearing apparel, not ornamented:
Of cotton:
Not knit
Item 382.33 Other .... 16.5% ad val.

(b) ornamentation of the types of methods covered hereby consists of ornamenting work done to a pre-existing textile fabric, whether the ornamentation was applied to such fabric—

(i) when it was in the piece,

(ii) after it has been made or cut to a size for particular furnishing, wearing apparel, or other article, or

(iii) after it had actually been incorporated into another article,

and if such textile fabric remains visible, at least in significant part, after ornamentation: *Provided,* That lace, netting, braid, fringe, edging, tucking, trimming or ornament shall not be required to have had a separate existence from the fabric or other article on which it appears in order to constitute ornamentation for the purposes of this headnote; and

(c) applique work, beads, bugles, spangles, bullions, and other forms of nontextile ornamentation applied to a textile fabric or other article of textile materials shall be disregarded in determining the component material of chief value of such fabric or other article.

The basic question is whether or not these articles are "ornamented" within the meaning of the Tariff Schedules. A focus on the existence of an ornamental effect is the first step required by the clear language of the statute and the pertinent legislative history.[5]

At the very start, the Court finds that the loops on these jeans do not visibly adorn, embellish, decorate or beautify the jeans.

The loops are small; they are made of the same material as the garment, and they are stitched in the same manner. They are plain, insignificant and unobtrusive in appearance. It is unreasonable to say that they adorn, beautify or enhance the appearance of the article in a manner that conforms to ordinary concepts of ornamentation.

Ordinarily, upon finding that the feature in question does not cause the article to be ornamented, the Court would proceed no further. However, the Court wishes to elaborate upon its rejection of defendant's assertions that unless a feature is demonstrably functional, it must, ipso facto, be ornamental.

As our Appellate Court has stated:

The first question is: Does the addition of [the feature] impart no more than an incidental, decorative effect? The next question is: Do the [features] have a functionality which is primary to any ornamentive nature? An affirmative answer to either results in a nonornamental classification. If the former is resolved first, the latter may no longer be critical to a determination.

---

[5] "Under the proposed definition of "ornamented," textile articles would no longer be assessed with rates of duty derived from paragraph 1529(a) on the basis of concealed, functionless pieces of braid, netting, etc. The rates derived from paragraph 1529(a) *would apply only if such materials were used primarily for ornamentation.*" U.S. Tariff Commission, Tariff Classification Study, schedule 3, p. 7 (1966) [emphasis added].

* * * * * * *

> * * * neither did Congress intend that all [features] be per se ornamental unless proved to have a function. If the importer, by a preponderance of the evidence proves any ornamentive aspects to be incidental, added proof of functionality is not mandated.

United States v. *Endicott Johnson Corp.* 67 CCPA 47, 50 C.A.D. 1242, 617 F.2d 278, 281 (1980).

The statute and the legislative history require that the first inquiry be whether the feature has an ornamental effect. If the feature does not visibly adorn, embellish, decorate or beautify the garment, the inquiry proceeds no further and the garment is properly classified as not ornamented. Only if the feature is visibly ornamental should we proceed to determine whether the feature possesses functionality to which the ornamental character is merely incidental, thus avoiding classification as "ornamented."

The cases cited by the defendant do not support the proposition that functionality is the first test of whether a garment is ornamented. Functional analysis became important in *Ferriswheel* v. *United States,* 69 CCPA —, C.A.D. 1260; 644 F.2d 865 (1981) only after it was first recognized that the epaulets on a jacket and the fringe on a kilt had a discernible decorative effect. See also *Bayliss Brothers, Inc.* v. *United States,* 56 CCPA 115, C.A.D. 964; 416 F.2d 1383. Here, the initial perception of ornamental qualities is entirely lacking and the question of functionality need not be reached.

In the case of *Sportswear International Ltd.* v. *United States,* 4 CIT —, Slip Op. 82-118 (Dec. 22, 1982), where certain loops caused a garment to be considered ornamented, it must either be presumed that a finding was made *sub silentio* that the loops possessed a distinctive ornamental effect or that the holding diverges somewhat from the principles enunciated in *Endicott Johnson.*

In any event, the evidence before the Court establishes that the loops are functional in origin,[6] in capability and in actual use. Therefore, even if the Court were to find that the loops possessed some ornamental character, the primarily functional nature of this feature would result in proper classification of the articles as "not ornamented."

Nonetheless, defendant also claims that loops originally designed to hold tools automatically cease to be "functional" on garments whose fabric weight, color and marketing might cause them to be worn as other than workclothes. This extremely restrictive view finds no support in the statute of the legislative history. Our Appellate Court has stated: "Functional features do not lose their functionality because they may not actually be used by most wearers. If this were the test, the functionality of features on garments could

[6] They were designed to hold tools.

only be determined after their sale to the public." *Ferriswheel* v. *United States*, 644 F.2d at 867.

For these reasons, the correct classification of these articles is as men's and women's wearing apparel, not ornamented, of cotton, under Items 380.39 and 382.33, TSUS.

Judgment will enter accordingly.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *March 24, 1983.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/133	Boe, J. May 10, 1983	General Time Corporation	78-8-01539	Items 720.02, 720.14 or 720.18, etc. Various rates	Item 688.36 5.5%	Texas Instruments, Inc. v. U.S. Slip Op. 81-38 (CIT 4/17/81), aff'd 3/25/82	Atlanta L.E.D. Modules used in solid-stated electronic clocks
P83/134	Ford, J. May 11, 1983	E. Mishan & Sons	80-3-000570	Item 389.62 15%+25¢ per lb. (merchandise marked "A" and "B")	Item 706.60 20% (merchandise marked "A") Item 751.05 20% (merchandise marked "B")	J. E. Mamiye & Sons v. U.S. (C.D. 4878, aff'd, 11/19/81) (merchandise marked "A") Agreed statement of facts (merchandise marked "B")	New York Tote bags (merchandise marked "A"); umbrellas (merchandise marked "B")
P83/135	Ford, J. May 11, 1983	J. C. Penney Purchasing Corporation	81-1-00007	Item 737.95 16.2%	Item A737.15 Free of duty pursuant to GSP	Agreed statement of facts	Savannah RadionControl Radio Cook-In, Catalog No. 920-00-49
P83/136	Ford, J. May 11, 1983	Randix Indus.	80-10-01638, etc.	Item 685.21 10.1% or 10.4%	Item 685.29 6%	Audiovox Corp. v. U.S. Slip Op. 81-11 (CIT 1/27/81)	New York FM converters
P83/137	Ford, J. May 11, 1983	Special Nutrients, Inc.	82-7-00964	Item 184.75 7.5%	Item 470.85 4%	Joseph F. Hendrix a/c Productos Deshidratados de Mexico, S.A. v. U.S. (C.D. 4809)	Miami Marigold extract

P83/138	Boe, J. May 11, 1983	J. C. Penney Purchasing Corporation	81-4-00463	Merchandise separately classified as "watch or clock movements" and assessed with duty at various rates under items 715.31, 716.18, 720.02, 720.16 and 720.18	Item 678.50 5% or 4% (merchandise marked "SFA" and "NA") Item 684.25 4% (merchandise marked "SFB" and "NB") Item 684.30 4% (merchandise marked "SFC" and "NC") Item 685.20 5% (merchandise marked "SFD") Item 685.40 5.3% (merchandise marked "SFE" and "NE")	Texas Instruments, Inc. v. U.S., Slip Op. 81-31 (CIT 4/17/81), aff'd 3/25/82	San Francisco, Norfolk Solid state timing devices; entirety with article in which incorporated

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/398	Watson, J. May 10, 1983	A & A Trading Corp.	R58/24615, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Not stated
R83/399	Watson, J. May 10, 1983	A & A Trading Corp.	R59/10637, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Boston Not stated
R83/400	Watson, J. May 10, 1983	National Silver Co.	R66/6352, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New Bedford (Boston) Earthenware/porcelaine ware and table cutlery
R83/401	Watson, J. May 10, 1983	Oriental Exporters, Inc.	R66/4828, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Tranceivers
R83/402	Watson, J. May 10, 1983	Wilmington Shipping Co.	R61/15145, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Wilmington, N.C. Wool rugs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/403	Re, C.J. May 11, 1983	Marubeni America Corp.	75-9-02373, etc.	Export value (merchandise marked "A") United States value (merchandise marked "B")	Unit values found by appraising customs official, less ocean freight and marine insurance, and without additions for currency fluctuation (merchandise marked "A") Equal to appraised values, less any additions made for currency fluctuation, and less 10% or invoiced unit values, less all nondutiable charges, whichever value is higher (merchandise marked "B")	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Fabrice (merchandise marked "A" and "B")
R83/404	Re, C.J. May 11, 1983	M. Hidary & Co., Inc.	76-5-01152	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/405	Re, C.J. May 11, 1983	Mitsui & Co. (USA), Inc.	76-7-01616, etc	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Savannah Not stated
R83/406	Re, C.J. May 11, 1983	Toyota Motor Sales	73-8-02169	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/407	Ford, J. May 11, 1983	Polaroid Corporation	81-10-01349	Constructed value	Represented by invoice unit prices plus a royalty of $0.67 each and assists of $0.17 each	Agreed statement of facts	Boston Model 2351 Sunpak Strobes

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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

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